

Articles and Essays

SOLUTIONS FOR REGULATING OFFSHORE OUTSOURCING IN THE SERVICE SECTOR: USING THE LAW, MARKET, INTERNATIONAL MECHANISMS, AND COLLECTIVE ORGANIZATION AS BUILDING BLOCKS

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I.	INTRODUCTION	540
II.	THE HISTORY AND BUSINESS USES OF OUTSOURCING	541
A.	<i>New Technology and Global Trade Allows Offshore Outsourcing of Service Sector Business Functions.....</i>	544
B.	<i>Increased Popularity of Offshore Outsourcing has Generated Ambiguous Data Regarding Domestic Impacts</i>	545
III.	USING EXISTING LAWS TO CONTROL PROVEN EFFECTS OF OFFSHORE OUTSOURCING IS A VIABLE BASIS FOR REGULATION	549
A.	<i>Privacy.....</i>	551
	1. Major U.S. Privacy Laws	553
	a. <i>Gramm-Leach-Bliley Financial Modernization Act....</i>	553
	b. <i>Health Insurance Portability and Accountability Act.....</i>	555
	c. <i>Other Federal Laws Addressing Privacy Issues.....</i>	558
	2. Federal Policies Should Balance Free Flow of Information with Personal Privacy	559
	3. Common Law Privacy Protection May Be Used to	

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	Target Improper Offshore Outsourcing Arrangements	560
4.	State Privacy Laws	564
5.	Private Sector Certification and Professional Regulations.....	566
6.	The European Privacy Directive and Other International Laws	570
	a. <i>EU-U.S. Safe Harbor</i>	572
	b. <i>EU Model Contracts</i>	573
	c. <i>Global Response to the EU Privacy Directive Shows That Imposing High Standards Can Generate Improvements in Foreign States</i>	574
B.	<i>Labor Rights</i>	576
	1. Reforming Domestic Labor Law	577
	2. Using Product Labeling to Capture Consumption Externalities of Offshore Outsourcing	581
	3. Unionization	584
	a. <i>Devising New Strategies for Unions</i>	589
IV.	INTERNATIONAL LAW, TREATIES, AND THE WTO.....	596
A.	<i>Regional, Bilateral and Multilateral Agreements</i>	600
B.	<i>Global Treaty on Offshore Outsourcing</i>	603
V.	CONCLUSION.....	606
A.	<i>Potential Domestic Law Reforms</i>	607
	1. Federal Privacy Law	607
	2. Labor Law	608
B.	<i>Market-based Solutions and Private Legal Agreements</i>	608
C.	<i>International Law</i>	610

I. INTRODUCTION

Due to technological advancements in telecommunications, transportation, and information processing, the typical work performed by service sector employees has dramatically changed. The typewriter, formal secretary, and filing rooms of past years have all given way to new technological phenomena demarcated as progressive steps toward greater corporate efficiency. Because modern service functions can be performed virtually anywhere using new technological tools, American businesses have more opportunities to pursue cost savings in labor. In effect, available labor markets have dramatically expanded, allowing those living in Asia, Africa, and South America to offer their services to U.S. employers. For savvy companies, the elimination of geospatial constraints may be

significant because many modern production functions can be performed in the same fashion, regardless of location. Accordingly, by sending labor functions abroad, businesses are able to decrease costs by avoiding expenses associated with U.S. employment, discrimination, safety, and perhaps even environmental legal standards. Because U.S. service sector employees lack the ability to waive the plethora of legal rules associated with their jobs and would suffer great difficulty if forced to accept the same salary as lower-wage foreign workers, the idea of outsourcing employment functions abroad has piqued concerns.

II. THE HISTORY AND BUSINESS USES OF OUTSOURCING

Outsourcing practices have long constituted an important part of competitive business strategy.¹ To illustrate, in 1966, “the U.S. Naval Academy operated its own production facility to provide milk for the midshipmen. At the time when these services were handed off to a third party, the organizations would have said they ‘outsourced’ them.”² Other historical examples include mining company-owned towns and retail stores that later became privately owned and managed.³

Business structures have responded to changes in technology and economic conditions by relying on outside entities to perform various functions. This transfer of formerly internal functions is central to most discussions of outsourcing. Thus, a classical outsourcing arrangement will refer to “an arrangement where a vendor provides services for a customer that traditionally have been provided by the customer itself.”⁴ For these arrangements, the “key is to break the task down into manageable segments.”⁵

By analyzing each functional aspect of business, managers began to use benchmarking techniques to assess performance levels.⁶ Accordingly, outsourcing began with non-core business functions being transferred to an external specialist in that function.⁷ The theory is that “[e]xcellence in a few core competencies is the source of the organization’s competitive

1. See, e.g., Daniel W. Drezner, *The Outsourcing Bogeyman*, FOREIGN AFFAIRS, May/June 2004 (discussing how outsourcing brings more benefits than costs and noting the long-time practice of outsourcing), available at <http://www.foreignaffairs.org/20040501faessay83301/daniel-w-drezner/the-outsourcing-bogeyman.html>.

2. JANE C. LINDER, OUTSOURCING FOR RADICAL CHANGE 27 (2004).

3. *Id.*

4. Molly Doland, *Introduction to LEGAL ISSUES IN OFFSHORE OUTSOURCING 1*, in CLE PROGRAM—LEGAL RISKS OF OUTSOURCING ABROAD (2004 A.B.A. Sec. Int’l L. & Prac. Annual Meeting).

5. Mary C. Daly, Remarks at the A.B.A. Section of International Law and Practice 2004 Annual Meeting (Aug. 7, 2004).

6. J. BRIAN HEYWOOD, THE OUTSOURCING DILEMMA 6–7 (2001).

7. *Id.* at ix.

advantage.”⁸ Thus, “[b]y focusing resources in a small number of activities, the organization’s preeminence in selected fields becomes increasingly difficult for competitors to overtake.”⁹ In many industry sectors, managing a web of outsourcing arrangements has become a core competency in itself. For instance, “outsourced components account for 50-70 percent of total-value added” for those in the aerospace industry, making management of strategic alliances critically important.¹⁰

The most commonly outsourced business functions are in five areas: (1) information technology, (2) business processes, (3) facilities management, (4) manufacturing, and (5) marketing.¹¹ Within each of these functions, both manual labor and service tasks may be involved. For instance, facilities management might include manual tasks such as janitorial services along with services such as remote video surveillance through the Internet. In past years, only the manufacturing and manual labor-based functions were susceptible to outsourcing in foreign countries. A typical deal would allow a company to “move the low-skill-intensive parts of production abroad, but continue to carry out the high-skill-intensive activities themselves.”¹² Today, advancements in communications, technology, transportation, and free trade have widened the range of functions that may be sent to overseas vendors.

Business managers now focus on information technology outsourcing (ITO) and business process outsourcing (BPO) as attractive methods to streamline performance.¹³ Both ITO and BPO functions involve routine tasks in technological, clerical, and accounting processes. ITO typically “includes functions such as desktop, network and server management and application development and maintenance.”¹⁴ BPO has become increasingly popular because vendors “tend to offer solutions that are more tailored to an individual customer’s needs.”¹⁵ The most common BPO functions are call centers, financing and accounting, human resource administration, and other tasks generally labeled as back office work.¹⁶

8. ELLEN M. PINT & LAURA H. BALDWIN, RAND CORP., STRATEGIC SOURCING: THEORY AND EVIDENCE FROM ECONOMICS AND BUSINESS MANAGEMENT 23 (1997).

9. *Id.* at 24.

10. *Id.* at 39.

11. *E.g.*, HEYWOOD, *supra* note 6, at 35 (chapter table of contents listing “reasons for outsourcing the various business functions”).

12. BOB ANDERTON ET AL., OUTSOURCING AND INEQUALITY 3 (Ctr. for European Pol’y Studies, Working Document No. 187, 2002), available at http://shop.ceps.be/BookDetail.Php?item_id=97 (last visited May 10, 2005).

13. *See* Doland, *supra* note 4, at 1 (listing ITO and BPO as two categories of outsourcing “currently receiving widespread attention”).

14. *Id.*

15. *Id.*

16. *Id.*

ITO and BPO are often integrated into a package outsourcing arrangement. By citing their ability to transform client business, large corporate entities such as Cap Gemini, Accenture, and IBM market their expertise in various BPO and ITO functions.¹⁷ Although some operations will involve a global framework with large companies, many outsourcing contracts are between small businesses located in one state. An example of this structure can be seen in the August 2004 contract between Queen's Medical Center, Hawaii's largest private hospital, and ACS, a provider of business process and information technology outsourcing solutions.¹⁸ In this outsourcing arrangement, "ACS will secure a new data center facility . . . in Honolulu to support the clinical and administrative system transformation and ongoing support of the new application environment."¹⁹ Here, the outsourcing decision was not merely based on cost reduction. Several benefits were proclaimed to arise from the contract, including: (i) "consolidat[ing] disparate IT operations into a single IT unit," (ii) hospital renovation, (iii) improved care delivery, and (iv) streamlined service.²⁰

Several U.S. states promote their geographic, educational, and other demographic characteristics conducive to outsourcing. In each instance, domestic outsourcing is marketed on the basis of competitive advantages for purchasing services from more efficient outside providers. For example, Tennessee emphasizes a competitive advantage in product delivery, the president of a Memphis real estate firm noted that "Memphis and Nashville's central location give them an opportunity to use warehouse space as distribution centers for quickly sending out products to the majority of the nation's population."²¹ Similarly, the South Carolina Competitiveness Initiative, a public-private collaboration, was designed to assess "the competitive position of South Carolina and several representative industry clusters."²² This statewide effort, in part, led to the creation of the International Center for Automotive Research (ICAR), which may result in "new South Carolina-grown companies . . . because of the synergies being developed."²³ This strategy is an implicit promotion of outsourcing because the newly created businesses will be offering their

17. See, e.g., *Outsourcing Has Its Limits*, ECONOMIST, Mar. 5, 2005, available at 2005 WLNR 3319260 (describing major outsourcing providers and mentioning that "[t]he outsourcing business is now about two-thirds IT-related and one-third BPO.").

18. *New Data Center Built to Support Contract With Queen's Medical Center*, HOSP. BUS. WK., Aug. 22, 2004, LEXIS, News Library, Hospital Business Week File.

19. *Id.*

20. *Id.*

21. Paige Orr, *A New China Syndrome*, BUS. TENN., May 2004, at 31, available at http://www.businesstn.com/issues/1_5/topnews/7288-1.html.

22. Darla Moore & Michael Porter, *Auto Research Park Proves State is Globally Competitive*, GREENVILLE NEWS, Feb. 28, 2004, available at <http://greenvilleonline.com/news/opinion/2004/02/28/2004022825958.htm>.

23. *Id.*

expertise in particular goods or services that might otherwise be performed in-house by major automobile companies.

A. *New Technology and Global Trade Allows Offshore Outsourcing of Service Sector Business Functions*

The current offshore outsourcing environment has rapidly developed to include a greater scope of tasks with higher levels of sophistication. For instance, “[r]adiologists in India and Australia interpret CT scans for patients in American hospitals” and “[e]ngineers in Russia design parts of Boeing’s airplanes.”²⁴ Increased sophistication has been most prevalent in the financial services sector, with investment banks hiring Indian firms to handle “basic financial modeling and comparable analysis.”²⁵ Other outsourced work has also included credit card processing, loan applications, and typical back-office functions.²⁶ In each case, proponents typically point to cost advantages and greater processing speed.²⁷ Financial institutions have also cited an increased ability to spread risks, offer 24-hour customer services, and allow senior analysts to concentrate on analysis rather than processing data.²⁸

Although offshore outsourcing is only one particular type of outsourcing arrangement, recent political debates and mass media outlets speak of outsourcing in the singular context of using low cost foreign labor.²⁹ Throughout this Article, the term offshore outsourcing will be used to refer to arrangements involving overseas vendors. However, it is important to note that media reports, legal documents, and speeches have used the following terms to describe the outsourcing of business functions to non-U.S. vendors: offshoring, outsourcing, offshore outsourcing, information technology outsourcing, and business process outsourcing.³⁰

24. JOSEPH I. LIEBERMAN, OFFSHORE OUTSOURCING AND AMERICA’S COMPETITIVE EDGE: LOSING OUT IN THE HIGH TECHNOLOGY R&D AND SERVICES SECTORS 13 (Office of Senator Joseph I. Lieberman, White Paper, May 11, 2004), available at <http://lieberman.senate.gov/newsroom/whitepapers/Offshoring.pdf>.

25. Don Durfee, *India Ink*, CFO, Feb. 1, 2004, 2004 WL 69925590.

26. E.g., Saritha Rai, *Financial Firms Hasten Their Move to Outsourcing*, N.Y. TIMES, Aug. 18, 2004, at W1 (discussing the outsourcing trend in the financial services sector).

27. *Id.*

28. *Id.*; Durfee, *supra* note 25.

29. See, e.g., Spencer E. Ante & Robert D. Hof, *Look Who’s Going Offshore*, BUS. WK. ONLINE, May 17, 2004 (discussing how technology startup companies are heading overseas even more eagerly than multinational companies), at http://www.businessweek.com/@Q2yIHYYQbsZHpRIA/magazine/content/04_20/b3883090mz063.htm.

30. See, e.g., S. Majumder, *India-US BPO Spat—Answer May Lie in FTA*, HINDU BUS. LINE, Apr. 14, 2004 (describing how “the BPO spat is turning out to be a hurdle in furthering economic relations” between the United States and India), at

B. Increased Popularity of Offshore Outsourcing has Generated Ambiguous Data Regarding Domestic Impacts

Although job reductions in the United States may stem from offshore outsourcing, there is considerable uncertainty in assessing the actual impact. For example, the Organisation for Economic Co-operation and Development (OECD), observed that “solid facts to underpin policy responses are lacking” with much remaining unknown about the role of outsourcing and offshoring.³¹ Hearings before Congressional committees illustrate this uncertainty with expert testimony citing disparate figures and contrasting examples of the true impact for domestic workers.³² Accordingly, understanding both the job creation and elimination theories relating to offshore outsourcing is critical for determining the needs and rationale of any viable policy solution.

To illustrate, a comparison may be made to the struggle to develop environmental policy that adequately balances diverse interests of environmental groups and industry. In this context, acknowledging the existence of non-consensus and division has been important in actual solutions implemented by the U.S. Environmental Protection Agency (EPA). For instance, the EPA’s Regulatory Negotiation and Consensus-Based Rulemaking program brought together “[i]ndustry, government regulators, labor unions, environmental organizations and environmental justice groups . . . to explore and promote innovative reforms in order to improve traditional regulatory approaches”³³ As in the environmental context, non-consensus on issues relating to offshore outsourcing should not be an excuse for stymieing important new regulations.

In light of the divisive and politicized environment for offshore outsourcing issues, Angela Styles, a legal expert in performance-based service contracting, emphasizes that any company doing offshore outsourcing cannot forget about the political perspective.³⁴ Accordingly,

<http://www.thehindubusinessline.com/2004/04/14/stories/2004041401390900.htm>; Katharine Mieszkowski, *What’s Labor Going to Do About Offshoring?*, SALON.COM TECH., Jan. 27, 2004 (interviewing Amy Dean, the president of the Silicon Valley nonprofit organization Working Partnerships USA, who discusses the “phenomenon of outsourcing and offshoring”), at http://archive.salon.com/tech/feature/2004/01/27/amy_dean/index_np.html.

31. OECD, MEETING OF THE OECD COUNCIL AT THE MINISTERIAL LEVEL 27 (2004), at <http://www.oecd.org/dataoecd/37/62/31718958.pdf>.

32. E.g., *The Offshoring of High-Skilled Jobs, Part II: Hearing Before the House Comm. on Small Bus.*, 108th Cong. 6–11 (2003) (contrasting statements of Harris N. Miller, President, Info. Tech. Ass’n of Am. and Ronil Hira, Chair, R&D Pol’y Comm., Inst. of Electrical & Electronics Eng’rs).

33. Alex Tynberg, *The Natural Step and Its Implication For a Sustainable Future*, 7 HASTINGS W.-NW. J. ENVTL. L. & POL’Y 73, 98 (2000).

34. Angela Styles, Remarks at the A.B.A. Section of International Law and Practice

Styles warns that “companies are at risk to become the Haliburtons of offshoring.”³⁵ The controversial nature of most arrangements largely stems from perceptions that offshore outsourcing results in a form of “labor arbitrage” by securing the lowest cost labor.³⁶ Based on research conducted at the Fisher Center for Real Estate and Urban Economics at UC-Berkeley’s Haas School of Business, “some 11 percent of all U.S. occupations are ‘vulnerable’ to [offshore] outsourcing.”³⁷ The reason for offshore outsourcing by U.S. companies is typically connected with cost-savings from pay gaps between skilled workers in the United States and those in offshoring target countries.³⁸ For example, U.S. architects are paid about ten times what architects in Vietnam are paid.³⁹

While wage disparities have long existed, most service sector jobs in the United States were insulated because geographic distances precluded the efficient transfer of information.⁴⁰ Today, better communication technology has eliminated many of the distance barriers, “putting white-collar workers in places like California in competition with millions of qualified workers in places like Eastern Europe and India.”⁴¹ Costs continually drop in response to improvements in communication capacities. For instance, “telecom capacity between India or China and the United States grew from 0 to 11,000 Gb/S between 1999 and 2001, while bandwidth pricing is almost nothing.”⁴²

The viability of offshore outsourcing has responded to global expansion in the available labor pool. The growing selection of low-cost foreign labor may also be attributed to the higher growth rates in the skilled worker supply abroad than in the United States. For instance, “India is

2004 Annual Meeting (Aug. 7, 2004).

35. *Id.*

36. Paul Craig Roberts, *The Harsh Truth About Outsourcing*, BUS. WK., Mar. 22, 2004, at 48.

37. Katharine Mieszkowski, *Gone in the Blink of an Eye*, SALON.COM TECH., Nov. 5, 2003, at http://archive.salon.com/tech/feature/2003/11/05/outsourcing_report/index_np.html.

38. See, e.g., *The Changing Nature of the Economy: The Critical Roles of Education and Innovation in Creating Jobs & Opportunity in a Knowledge Economy: Hearing Before the House Comm. on Educ. and the Workforce*, 108th Cong. 44 (2004) [hereinafter *Hearings*] (statement of Dr. Jared Bernstein, Senior Economist, Economic Policy Institute) (“What differentiates foreign workers from their domestic counterparts is . . . a huge and gaping wage differential.”).

39. See, e.g., *id.* at 46 n.2. See generally Andrew Bibby, *Designs for Western Living from the East*, FIN. TIMES (London), Sept. 2, 2003, 2003 WL 62022613 (“British architects are turning to Vietnam as the outsourcing trend grows . . .”).

40. SANDRA POLASKI, *JOB ANXIETY IS REAL—AND IT’S GLOBAL 2* (Carnegie Endowment for Int’l Peace, Policy Brief No. 30, 2004), at <http://www.ceip.org/files/pdf/Policybrief30.pdf>.

41. *Id.*

42. LIEBERMAN, *supra* note 24, at 15.

adding about twice as many college graduates [as the United States] to its workforce per year,” including greater numbers in engineering fields.⁴³

Styles suggests these increased numbers may also relate to U.S. foreign policies that have long promoted training and education in developing and communist countries.⁴⁴ With greater economic openness in these formerly isolated economies, skilled foreign workers are now available to work in ways previously forbidden by their governments.⁴⁵ As a result, some fear that the scope of jobs susceptible to lower-cost offshore outsourcing will greatly expand.

Because offshore outsourcing of service sector functions has seen new growth in recent years, numerous media reports have highlighted connections to losses in service jobs. Accordingly, this has led to fears that the United States’ “competitive advantage is gone,”⁴⁶ meaning that educated foreign workers could potentially replace over eighty-three percent of the American non-farm workforce population that performs various service work.⁴⁷ Data has been cited to support this argument, with reports noting that “[s]ince December 2000, 632,000 jobs have disappeared in high technology services industries”⁴⁸ Similar reductions were noted between 2001 and 2002, with employment in IT service jobs declining by 9.2 percent.⁴⁹ One example is an April 2004 article in *Fast Company* magazine that focuses on these concerns by including photographs and quotations of people who claim to have lost work due to offshore outsourcing.⁵⁰ Personalizing the human impacts with the cover headline “Look Into Their Eyes” and including individual stories, *Fast Company* paints a dismal picture of workers who, as their own jobs were being eliminated, were induced to train their foreign replacements.⁵¹

Academic research sometimes mirrors these fears, with one study arguing that “competitive pressures stemming from foreign trade can weaken employers’ use of implicit contracts that shield workers’ wages from the vagaries of the external labor market.”⁵² Moreover, Senate findings point out that “[i]n 2005, 588,000 American jobs are projected to be moved overseas. In 2010, that number is expected to grow to 1,600,000

43. *Hearings*, *supra* note 38, at 50 (statement of Dr. Jared Bernstein, Senior Economist, Economic Policy Institute).

44. Styles, *supra* note 34.

45. POLASKI, *supra* note 40, at 1.

46. Jennifer Reingold, *Into Thin Air*, *FAST COMPANY*, Apr. 2004, at 76, 79.

47. LIEBERMAN, *supra* note 24, at 12.

48. *Id.* at 10.

49. *Id.*

50. Reingold, *supra* note 46, at 79.

51. *Id.*

52. LYNN A. KAROLY & CONSTANTIN W. A. PANIS, RAND CORP., *THE 21ST CENTURY AT WORK: FORCES SHAPING THE FUTURE WORKFORCE AND WORKPLACE IN THE UNITED STATES* 178 (2004), at http://www.rand.org/pubs/monographs/2004/RAND_MG164.pdf.

and by 2015, 3,300,000 American jobs will be moved overseas.”⁵³

In contrast to findings of job loss, a body of research indicates offshore outsourcing may offer overall benefits for domestic labor. For example, several studies argue that domestic economies benefit from offshore outsourcing, one such report estimating a net benefit of \$1.12 to \$1.14 for every \$1 spent on outsourcing.⁵⁴ The theory is that new profits, efficiency, and corporate expansion will translate into net increases. Hence, the argument is that the “innovation and productivity increases that render some jobs obsolete are also the source of new wealth and rising living standards.”⁵⁵ Accordingly, “many jobs are either kept or created during the outsourcing process as efficiency gains are transferred to consumers in terms of lower prices or re-invested in new businesses.”⁵⁶ Statistical evidence has been used to support this theory. For instance, “the Department of Labor is forecasting a thirty-five percent increase in computer- and math-related jobs over the next decade.”⁵⁷ Offshore outsourcing proponents argue that with these new jobs, incremental real wage gain will increase significantly by 2008.⁵⁸

These facts discount contrary data of declines in technology sector jobs, with one commentator noting that “the major culprits were the slowdown in demand for IT services after the Y2K buildup, followed by the dot-com collapse and the broader recession.”⁵⁹ Moreover, some have challenged whether the U.S. has, in fact, experienced net losses in jobs in particular service industries. For example, a report released by the Information Technology Association of America and Global Insight (USA), Inc. notes that “[a]fter accounting for the number of displaced IT software and services jobs, the net number of new jobs in 2003 was estimated to be over 90,000”⁶⁰

Even when acknowledging job losses, offshore outsourcing proponents point out a number of offsetting factors. For instance, University of Chicago Professor Daniel W. Drezner notes two distinct mitigating factors: (1) “close to ninety percent of jobs in the United States

53. Keeping American Jobs at Home Act, S. 2531, 108th Cong. § 2 (2004).

54. *Stolen Jobs?*, THE ECONOMIST, Dec. 13-19, 2003, at 14.

55. BRINK LINDSEY, JOB LOSSES AND TRADE: A REALITY CHECK 11 (CATO Inst., Ctr. for Trade Pol’y Studies, Trade Briefing Paper No. 19, 2004).

56. OECD, *supra* note 31, at 28.

57. LINDSEY, *supra* note 55, at 1.

58. E.g., GLOBAL INSIGHT (USA), INC., EXECUTIVE SUMMARY: THE COMPREHENSIVE IMPACT OF OFFSHORE IT SOFTWARE AND SERVICES OUTSOURCING ON THE U.S. ECONOMY AND THE IT INDUSTRY 4 (2004) (“Currently, the estimated real wage gain is hovering around 0.1%. As offshore ITO spending increases over the next five years . . . the incremental wage gain is expected to reach 0.44% in 2008.”), at <http://www.itaa.org/itserv/docs/execsumm.pdf>.

59. LINDSEY, *supra* note 55, at 7.

60. GLOBAL INSIGHT (USA), INC., *supra* note 58, at 6.

require geographic proximity,” and (2) “the economy is undergoing a structural transformation [with] jobs . . . disappearing from old sectors (such as manufacturing) and being created in new ones (such as mortgage brokering).”⁶¹ In any structural transformation, Drezner argues, “creation of new jobs lags behind the destruction of old ones.”⁶²

III. USING EXISTING LAWS TO CONTROL PROVEN EFFECTS OF OFFSHORE OUTSOURCING IS A VIABLE BASIS FOR REGULATION

Because no clear consensus or study citing the actual impact on U.S. domestic labor currently exists, new offshore outsourcing regulation faces the risk of being based on false data. Instead of creating an entirely new policy regime, a viable option may be to expand and amend currently existing laws to accommodate the demonstrated effects of offshore outsourcing. In discussing the history of tax policy, for instance, Fred Goldberg argues that “‘structure’ matters: policies that are universal, appeal to core values, and are (relatively speaking) easily administered . . . are durable and have a way of evolving and expanding.”⁶³ Offshore outsourcing touches on many stable, established legal issues apart from job impact. Thus, a challenge is to catalog the various issues and determine how to harness the currently existing administrative enforcement mechanisms and legal framework.

To date, lawmakers acknowledge offshore outsourcing may involve issues relating to privacy, labor rights, intellectual property, immigration, environmental protection, taxation, export controls, and national security.⁶⁴ For example, reports abound of “Indian gangs that have offered call centre workers a year’s salary in exchange for Western customers’ credit card details.”⁶⁵

Currently, “federal privacy laws do not protect individuals when foreign companies misuse their personal information.”⁶⁶ With between 150,000 and 200,000 American tax returns being prepared in India, many fear that this sensitive data could be exploited overseas.⁶⁷

61. Drezner, *supra* note 1.

62. *Id.*

63. Fred T. Goldberg, Jr., *From FDR to W: The IRS as Financial Intermediary*, 29 OHIO N.U. L. REV. 1, 4 (2002).

64. *E.g.*, Doland, *supra* note 4, at 1 (listing potential legal issues raised by offshore outsourcing).

65. Edmund Conway, *Legal Challenge to Call Centres: Bank Union Claims Outsourcing to India Can Contravene European Law*, DAILY TELEGRAPH (London), Aug. 18, 2004, at 27.

66. Lou Dobbs, *Is Nothing Private Anymore?*, U.S. NEWS & WORLD REP., May 17, 2004, at 57.

67. *Id.*

Similarly, labor groups and politicians have raised concerns about inadequate labor protections. Typically, U.S. employment laws covering issues such as sexual harassment, age discrimination, and worker safety do not protect foreign workers.⁶⁸ Instead, these workers “are covered by employment laws in their own countries that U.S. labor officials say are often not as strict.”⁶⁹

Because the wide-ranging effects of offshore outsourcing are objectively documented in various studies, this Article is not focused on whether offshore outsourcing is inherently good or bad. Instead, the analysis begins by connecting these effects with specific discussions of U.S. domestic laws, market-based reforms, and potentially applicable foreign laws and regulatory mechanisms. Beginning with an acknowledgment of domestic legal issues is crucial because policymakers may use existing law, avoiding potentially duplicative rules on a particular subject. Moreover, the resources embodied in administrative agencies and enforcement structures may be harnessed more easily and effectively by beginning with the current legal structure. In addition to describing current laws and pinpointing distinctions relevant to offshore outsourcing, this Article suggests new legal strategies, amendments, and market solutions. Suggestions are aimed at presenting a template that could be utilized or enhanced by those seeking to address challenges posed by offshore outsourcing. Many state and federal efforts have already included comprehensive reforms touching on many areas of law, such as labor, tax, and health care privacy.⁷⁰ Accordingly, this Article will focus on how some of these domestic legal matters may be modified to create solutions.

National and local solutions, however, do not exist in isolation from larger international contexts. Thus, because offshore outsourcing epitomizes the globalization of business, technology, and law, international mechanisms are essential factors to consider in developing any regulatory model. This analysis will largely relate to the efficacy of domestic regulation under existing methods of international law and cooperation, such as the World Trade Organization, the United Nations, and various multilateral agreements and treaties. While it may be impossible to predict every policy implication attaching to offshore outsourcing, the included

68. Stephanie Armour, *Outsourcing Critics Cite Labor Laws in Other Nations*, USA TODAY, Mar. 22, 2004, at 9B.

69. *Id.*

70. See, e.g., Keeping American Jobs at Home Act, *supra* note 53, at §§ 101, 103 (eliminating tax subsidies for outsourcing jobs, providing wage insurance for displaced workers upon reemployment); Jobs for America Act of 2004, S. 2090, 108th Cong. § 2 (2004) (seeking to amend the Worker Adjustment and Retraining Notification Act to address offshore outsourcing); Dobbs, *supra* note 66, at 57 (discussing efforts by Congressional Democrats to enact legislation to “better safeguard information sent overseas”).

discussions and analyses are intended to guide ongoing development strategies. Accordingly, because offshore outsourcing is a continually evolving business practice, legal policies and markets will have to remain flexible to respond to new understandings.

A. Privacy

Regardless of whether jobs are being lost or gained from offshore outsourcing, both sides push for fortification of personal data privacy and protections when records are sent abroad.⁷¹ Because ITO can involve transfers through networks located in many jurisdictions, there is a question of who may exercise authority when something goes awry.⁷² Currently, “there are at least 11 federal privacy laws and many states have implemented their own” laws for information handling and security.⁷³ This domestic legal framework is often referred to as a “mosaic approach” because most laws offer “targeted protection for individuals in answer to defined problems.”⁷⁴ For example, “[t]he Equal Credit Opportunity Act of 1974 limits the use of data relating to sex, race, color, religion, national origin, age or marital status for purposes of unlawful discrimination with respect to the grant of credit.”⁷⁵ However, “the law does not address the collection or storage of such information.”⁷⁶ The industry-specific focus has created difficulties for companies attempting to track and comply with regulations.

In addition to current statutory mechanisms, corporate privacy policies and certain foreign legislation may also be applicable depending on the type of information transfer. Oftentimes, an additional layer of law and regulation will apply to an offshore outsourcing arrangement depending on the method by which a company structures the information transfer. Certain written statements of privacy, corporate privacy policies, and/or deceptive company conduct could trigger Federal Trade Commission

71. See, e.g., Laura Mahoney, *California Lawmakers Weigh Privacy, Labor Effects of Curbs on Offshore Outsourcing*, Privacy L. Watch (BNA) ISSN 1536-1977 (Mar. 12, 2004) (discussing the threats to personal privacy created by offshoring and the measures companies put in place to protect them), available at <http://subscript.bna.com/SAMPLES/prl.nsf/0/148e2ff25aba829585256e5500043fcd?OpenDocument>.

72. Dobbs, *supra* note 66, at 57.

73. John Nicholson, *Data Privacy in the US*, LEGAL ISSUES IN OFFSHORE OUTSOURCING 4, in CLE PROGRAM—LEGAL RISKS OF OUTSOURCING ABROAD (2004 A.B.A. Sec. Int'l L. & Prac. Annual Meeting).

74. Joel R. Reidenberg, *Privacy in the Information Economy: A Fortress or Frontier for Individual Rights?*, 44 FED. COMM. L.J. 195, 209 (1992); see also Nicholson, *supra* note 73, at 4 (referring to the “mosaic of regulation”).

75. Reidenberg, *supra* note 74, at 214.

76. *Id.*

(FTC) enforcement action. For example, Tower Records' website privacy policy claimed that "[w]e use state-of-the-art technology to safeguard your personal information," and "[y]our TowerRecords.com Account information is password-protected. You and only you have access to this information."⁷⁷ Citing technology flaws allowing information leaks, the FTC complaint alleged that Tower's privacy assurances violated section 5 of the Federal Trade Commission Act.⁷⁸ In light of numerous similar actions against other online businesses, it is possible that offshore outsourcing transactions would also be subject to FTC jurisdiction. Because these actions are based on "unfair or deceptive acts or practices," the form of regulatory authority under current law may equate to a form of ad hoc data privacy protection.⁷⁹

Given that every offshore outsourcing will involve multiple jurisdictions, it is important to note that foreign privacy laws may apply to offshore outsourcing transactions.⁸⁰ In some instances, the level of protection could vary significantly from U.S. domestic law. Europe, for instance, employs a highly comprehensive method in regulating privacy issues based on each citizen's basic legal right to "information self-determination."⁸¹ This right "puts the citizen in control of the collection and use of personal information."⁸² These stringent regulations are applicable to corporations that process data of European origin.⁸³ Accordingly, lawmakers and executives should be aware of the main provisions of *Directive 95/46/EC of the European Parliament and of the Council of 24 Oct. 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data* ("EU Privacy Directive").⁸⁴ By considering the EU Privacy Directive in framing U.S. domestic offshore outsourcing privacy laws, lawmakers may be able to avoid imposing conflicting obligations. Moreover, some U.S. scholars propose coordination with the European approach on grounds that

77. Nicholson, *supra* note 73, at 9 (citing *In re MTS, Inc.*, FTC File No. 032-3209).

78. *Id.* Under a settlement with the FTC, Tower Records had to take certain steps to ensure the security of private information disclosed on its website. *Id.*

79. *Id.* at 6.

80. See, e.g., H. Ward Classen & Tara Goff Kamradt, *Our Mini-theme: Privacy in a New Era*, BUS. L. TODAY (A.B.A. Sec. of Bus. L.), Nov./Dec. 2004 (previewing articles on EU and Canadian personal information and privacy laws).

81. *Hearing on the EU Data Protection Directive: Implications for the U.S. Privacy Debate, Subcomm. on Commerce, Trade, and Consumer Protection, Comm. on Energy and Commerce*, 107th Cong. 68 (2001) (prepared statement of Joel R. Reidenberg, Fordham University School of Law) [hereinafter Reidenberg statement].

82. *Id.*

83. See *id.* at 70 (stating that European law "requires that foreign standards of fair information practice be 'adequate' in order to permit transfers of personal information to the foreign destination").

84. Council Directive 95/46/EC, 1995 O.J. (L 281) 31.

information privacy benefits and shapes society.⁸⁵ Accordingly, they argue, it “can be seen as a commons that requires some degree of social and legal control to construct and then maintain.”⁸⁶

1. Major U.S. Privacy Laws

The most comprehensive data privacy protections relate to financial information and health care.⁸⁷ These statutes will be discussed in detail along with brief descriptions of other relevant legislation that may affect offshore outsourcing.

a. Gramm-Leach-Bliley Financial Modernization Act

The primary motivation for enacting the Gramm-Leach-Bliley Financial Modernization Act of 1999⁸⁸ was “to increase the competition of the financial services industry through a statutory framework.”⁸⁹ The new law removed former restrictions that banks must only engage in banking activity. This allowed the formation of new financial holding companies that could now perform a wider variety of activities.⁹⁰ By allowing these structural changes, the law also allows freer use of information. Thus, “a firm engaged in both banking and insurance operations can correlate information gathered from both activities to make even better decisions about customers.”⁹¹ In order to accommodate privacy concerns arising from these structural changes, Congress also included privacy protections for nonpublic personal financial information collected and used by financial institutions.⁹² The statute defines financial institutions to “include any institution whose business is engaging in activities that are ‘financial in nature.’”⁹³

Congress included privacy as a mandatory requirement, providing that “each financial institution has an affirmative and continuing obligation to

85. See Paul M. Schwartz, *Property, Privacy, and Personal Data*, 117 HARV. L. REV. 2055, 2088 (2004) (“Many scholars perceive information privacy as benefiting and shaping society.”).

86. *Id.*

87. See, e.g., Nicholson, *supra* note 73, at 4–5 (listing the Gramm-Leach-Bliley Financial Modernization Act and the Health Insurance Portability and Accountability Act as “[t]he major US federal privacy laws”).

88. Pub. L. No. 106-102, 113 Stat. 1338 (1999) (codified as amended in scattered sections of 12 U.S.C. and 15 U.S.C.).

89. Jolina C. Cuaresma, *The Gramm-Leach-Bliley Act*, 17 BERKELEY TECH. L.J. 497, 500 (2002) (citing Pub. L. No. 106-102, 113 Stat. 1338, 1338 (1999)).

90. See *id.* at 502 (discussing the effect of the Act on financial holding companies).

91. *Id.*

92. Nicholson, *supra* note 73, at 5.

93. *Id.* at 4.

respect the privacy of its customers and to protect the security and confidentiality of those customers' nonpublic personal information."⁹⁴ In effectuating this purpose, the law stipulates that financial institutions must either provide notice to the consumer prior to disclosing information to a nonaffiliated third party or satisfy the statutorily defined "opt out" procedure.⁹⁵ The opt out process involves sending a written or electronic notice to the consumer, explaining clearly and conspicuously that personal data may be disclosed to a third party.⁹⁶ The consumer must then have an opportunity, before the time such information is initially disclosed, to direct that the information not be disclosed.⁹⁷ The Gramm-Leach-Bliley Act also contains requirements that: (i) financial holding companies provide a copy of their privacy policy to customers,⁹⁸ (ii) companies receiving nonpublic personal information may only re-use the data for "the purpose for which it was provided or . . . to the extent that the financial institution may legally use the information," and (iii) companies handling information covered by the Act implement reasonable safeguard standards.⁹⁹

Financial institutions are broadly defined in the act to include a wide range of financial businesses such as data processing companies or even a department store that issues a credit card.¹⁰⁰ Thus, privacy provisions included in the Gramm-Leach-Bliley Act could apply to many "[o]ffshore outsourcing vendors who receive information from US [sic] customer companies that are financial institutions."¹⁰¹

Yet even though significant data privacy protections may apply to offshore outsourcing, Gramm-Leach-Bliley has been criticized for containing loopholes allowing unbridled use of personal information.¹⁰² For instance, nonpublic personal information as defined by the act would not cover data if "a financial institution has a 'reasonable basis' to believe

94. 15 U.S.C. § 6801(a) (2000).

95. 15 U.S.C. § 6802(a) & (b) (2000).

96. 15 U.S.C. § 6802(b)(1)(A).

97. 15 U.S.C. § 6802(b)(1)(B).

98. 15 U.S.C. § 6803(a) (2000).

99. Nicholson, *supra* note 73, at 5. See also Janice A. Alwin, Comment, *Privacy Planning: Putting the Privacy Statutes to Work For You*, 14 DEPAUL BUS. L.J. 353, 361 (2002) (discussing the types of data that can be shared under the Gramm-Leach-Bliley Act).

100. Nicholson, *supra* note 73, at 4–5.

101. *Id.* at 5.

102. See, e.g., Neal R. Pandozzi, *Beware of Banks Bearing Gifts: Gramm-Leach-Bliley and the Constitutionality of Federal Financial Privacy Legislation*, 55 U. MIAMI L. REV. 163, 194–97 (2001) (stating that notwithstanding the Gramm-Leach-Bliley Act, personal information revealed to banks may be shared with other institutions in certain instances); R. Bradley McMahon, Note, *After Billions Spent to Comply with HIPAA and GLBA Privacy Provisions, Why is Identity Theft the Most Prevalent Crime in America?*, 49 VILL. L. REV. 625, 638 (2004) (arguing that the Gramm-Leach-Bliley Act's "protection of private personal information is minimal").

it is lawfully available to the general public from government records and widely distributed media.”¹⁰³ In addition, financial institutions may share even nonpublic personal information with their affiliates and use this information in “servicing or processing a financial product or service requested or authorized by the consumer.”¹⁰⁴

Recently, a growing number of local and state laws have begun to impose higher standards on financial institutions such as mandatory opt-in permission for certain uses of nonpublic personal data.¹⁰⁵ Therefore, it is possible that uniform state privacy laws or local efforts may constitute a potential means for strengthening data protection in the offshore outsourcing context.

b. Health Insurance Portability and Accountability Act

In 1996, Congress enacted the Health Insurance Portability and Accountability Act (HIPAA) to reform health insurance practices and set national standards for electronic health care transactions.¹⁰⁶ Two sections of the law were developed to accomplish these objectives. The Health Insurance Reform section relates to protecting insurance coverage for families when changing jobs.¹⁰⁷ The other section, the Administrative Simplification, addresses the policy goals of streamlining and simplifying health care administration.¹⁰⁸ Because the administrative provisions called for increased use of electronic communication in health care, concerns arose regarding personal privacy. The basic statute took the approach that “disclosure is a presumptive wrong, and not a routine incident of business within the health care system. It therefore follows that disclosure has to be justified.”¹⁰⁹ This portion of HIPAA “included language giving Congress three years to pass a privacy law.”¹¹⁰ In addition, the law required the Department of Health and Human Services (HHS) to adopt privacy

103. Cuaresma, *supra* note 89, at 511.

104. 15 U.S.C. § 6802(e)(1)(A) (2000).

105. See, e.g., Chris Jay Hoofnagle, *GLB: More Protections Needed To Ensure Financial Privacy*, in FINANCIAL SERVICES MODERNIZATION 2003: IMPLEMENTATION OF THE GRAMM-LEACH-BLILEY ACT 199, 205 (A.L.I.-A.B.A., Course of Study Materials, 2003) (discussing opt-in laws recently passed in North Dakota and California).

106. Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered titles of U.S.C.).

107. 29 U.S.C. §§ 1181-1186 (2000).

108. 42 U.S.C. §§ 1320d-1329d-8 (2000).

109. Richard A. Epstein, *HIPAA on Privacy: Its Unintended and Intended Consequences*, 22 CATO J. 13, 24 (2002), available at <http://www.cato.org/pubs/journal/cj22n1/cj22n1-3.pdf>.

110. Joseph Goedert, *HIPAA's Long and Winding Road*, HEALTH DATA MGMT. (Mar. 2003), available at <http://www.healthdatamanagement.com/html/current/PastIssueStory.cfm?PostID=14319&PastMonth=March&PastYear=2003>.

standards for certain health care providers.¹¹¹

Pursuant to the congressional directive, HHS promulgated rules for privacy and security of health care information in December 2000.¹¹² The HIPAA Privacy Rule applies to “covered entities,” meaning “anyone who provides or pays for health care in the normal course of business.”¹¹³ Such entities “include health plans . . . health care clearinghouses and healthcare providers who transmit information in an electronic form in connection with a transaction governed by HIPAA rules.”¹¹⁴ The Privacy Rule covers “all individually identifiable health information (“IIHI”) that is transmitted or maintained electronically or in ‘any form or medium.’”¹¹⁵ The Rule defines IIHI as including, among other things, information relating “to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual.”¹¹⁶

In the context of offshore outsourcing of health care data, the Rule may preclude dissemination and certain uses of IIHI. For example, data safeguards mandated under HIPAA rules stipulate “reasonable and appropriate administrative, technical, and physical safeguards to prevent intentional or unintentional use or disclosure of protected health information.”¹¹⁷ However, “HIPAA permits the disclosure of information to a ‘business associate’ if the covered entity obtains satisfactory assurance that the business associate will safeguard the information pursuant to a written agreement.”¹¹⁸ Because the definition of business associate relates to whether an entity has access to protected information, “an outsourcer that will have more than incidental access to a covered entity’s individually identifiable health information will be considered a business associate of the covered entity.”¹¹⁹ Given the potential liability of a covered entity if its

111. PHYSICIAN PRACTICE RES. CTR., MASS. MED. SOC’Y, HIPAA ELECTRONIC TRANSACTIONS AND CODE SETS: MEETING THE OCTOBER 16, 2003 COMPLIANCE DEADLINE AND BEYOND 2 (Aug. 2003), at http://www.massmed.org/pages/hipaa_code_sets.pdf.

112. Fred H. Cate, *Principles for Protecting Privacy*, 22 CATO J. 33, 46 (2002), available at <http://www.cato.org/pubs/journal/cj22n1/cj22n1-4.pdf>. These rules were subsequently amended in March 2002. *Id.*

113. *Id.*

114. Nicholson, *supra* note 73, at 5.

115. *Id.*

116. 45 C.F.R. § 160.103 (2004).

117. U.S. DEP’T OF HEALTH & HUMAN SERVS., SUMMARY OF THE HIPAA PRIVACY RULE 14, at <http://www.hhs.gov/ocr/privacysummary.rtf> (last revised May 2003).

118. Nicholson, *supra* note 73, at 5.

119. RANDALL E. COLSON, HIPAA AND OUTSOURCING: THE IMPACT OF BUSINESS ASSOCIATE RULES UNDER THE FINAL PRIVACY AND SECURITY STANDARDS 12 (Negotiating Tech. Outsourcing Agreements—Law Seminars Int’l, Sept. 30, 2003), at http://www.haynesboone.com/FILES/tbl_s12PublicationsHotTopics/PublicationPDF60/110

business associate does not adequately protect information, “covered entities will most likely require business associates to agree to the same obligations that apply to the covered entity” despite the Rule’s more general requirements for business associates.¹²⁰

The rigorous data safeguards imposed under HIPAA may warrant self-assessments, employee training, and increased technological capacities to assure compliance. In outlining some of the necessary steps, the National Institute of Standards and Technology published a ninety-six-page analysis to detail some ways in which companies can best comply. One example refers to a small health care service organization whose inspection team, after completing a risk assessment, “recommend[ed] that the organization install a firewall, upgrade its virus detection and containment software, and also implement an automated access control function and an audit capability.”¹²¹

The cost of compliance may be significant: “[i]n economic terms, HHS calculates the compliance cost at \$3.2 billion for the first year, and \$17.6 billion for the first 10 years. Health care consulting companies predict that the cost will be much higher—between \$25 and \$43 billion . . . for the first five years for compliance alone”¹²²

With the mounting costs of technology, training, penalties, and expertise, HIPAA privacy regulations are often viewed as rigorous burdens for health care providers.¹²³ However, the increased focus on compliance with HIPAA regulations has led to the creation of a niche market in offshore outsourcing.¹²⁴ Alleviating internal changes and expenses, “[t]he outsourcers provide end-to-end solutions, using encryption, authentication of senders and receivers, data compression for speedy delivery, digital certificate hosting services, biometric features to verify identification and audit trail reports.”¹²⁵ In addition, some healthcare organizations are outsourcing to application service providers to eliminate “the need to replace or modify old legacy systems.”¹²⁶ In light of these examples, HIPAA provides a significant illustration of how greater regulation aimed

3/09_30_2003_Colson.pdf.

120. *Id.* at 15.

121. PAULINE BOWEN ET. AL., NAT’L INST. OF STANDARDS & TECH., AN INTRODUCTORY RESOURCE GUIDE FOR IMPLEMENTING THE HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA) SECURITY RULE 17 (Nat’l Inst. of Standards & Tech. Special Publication 800-66, 2004), available at <http://www.csrc.nist.gov/publications/drafts/DRAFT-sp800-66.pdf>.

122. Cate, *supra* note 112, at 51 (footnote omitted).

123. See *id.* at 49–52 (detailing some of the burdens created by HIPAA).

124. See KATHLEEN GOOLSBY, PERSPECTIVES ON HIPAA 6–7 (Outsourcing Ctr., White Paper, 2001), at http://www.outsourcing-requests.com/common/sponsors/4664/Perspectives_on_HIPAA.pdf (discussing the outsourcing of HIPAA compliance solutions).

125. *Id.* at 6.

126. *Id.*

at perceived negative aspects of offshore outsourcing can be implemented without harming the viability of these arrangements. Instead, the privacy and security regulations of HIPAA have led offshore outsourcing entities to market their compliance expertise as a competitive advantage.

Forecasting these business advantages, Congresswoman Diana DeGette of Colorado pointed out that “the issue of privacy can be a new opportunity for increased consumer confidence and trust in business.”¹²⁷ Using similar rationale, policymakers considering future efforts to regulate offshore outsourcing may reference the impact of HIPAA as evidence that heightened standards could induce similar competitive marketing. Thus, companies would emerge to offer services that offered greater compliance with specific areas of concern such as labor standards, privacy, and immigration.

c. Other Federal Laws Addressing Privacy Issues

With the emergence of technology and advances in marketing, personal privacy became a pinnacle concern often attached to new regulations. Some point to the legislation as evincing the broad theme of vesting “consumers with control over information in the marketplace, irrespective of whether the information is, or could be, used to cause harm.”¹²⁸ Moreover, privacy seems inexorably tied to regulatory proposals aimed at electronic communications and data, based on the rationale that “[w]ithout trust in digital systems and networks, the benefits of this growing economy will be severely limited, and the American public will miss a golden opportunity.”¹²⁹ Accordingly, offshore outsourcing arrangements should consider new federal laws that touch on privacy,¹³⁰ such as: (1) the Children’s Online Privacy Protection Act of 1998 (COPPA),¹³¹ (2) the Fair Credit Reporting Act (FCRA),¹³² (3) the Cable Communications Policy Act of 1984 (CCPA),¹³³ (4) the Telephone

127. *Privacy in the Commercial World: Hearing Before the House Subcomm. on Commerce, Trade, and Consumer Protection of the Comm. on Energy and Commerce*, 107th Cong. 3 (2001) (opening statement of Rep. Diana DeGette, Member, House Subcomm. on Commerce, Trade, and Consumer Prot.) [hereinafter *Privacy in the Commercial World*].

128. Fred H. Cate, *The Privacy Problem: A Broader View of Information Privacy and the Costs and Consequences of Protecting It*, FIRST REP., Mar. 2003, at 1, 5, available at <http://www.firstamendmentcenter.org/PDF/FirstReport.privacyproblem.PDF>.

129. *Privacy in the Commercial World*, *supra* note 127, at 7 (statement of Rep. Michael F. Doyle, Member, House Subcomm. on Commerce, Trade, and Consumer Prot.).

130. Nicholson, *supra* note 73, at 6–7.

131. 15 U.S.C. §§ 6501–6506 (2000).

132. 15 U.S.C. §§ 1681, 1681a to 1681t (2000).

133. 47 U.S.C. § 551 (2000).

Consumer Protection Act of 1991 (TCPA);¹³⁴ (5) the Telemarketing and Consumer Fraud and Abuse Prevention Act (TCFAP);¹³⁵ (6) the “Do-Not-Call Implementation Act”;¹³⁶ (7) the Electronic Communications Privacy Act of 1986 (ECPA);¹³⁷ and (8) the Family Educational Rights and Privacy Act of 1974 (FERPA).¹³⁸ Because privacy protection has been increasingly highlighted in Congressional hearings, legislation, and media reports, parties arranging offshore outsourcing agreements should be wary that the list of relevant federal laws is continually evolving.

2. Federal Policies Should Balance Free Flow of Information with Personal Privacy

Based on widely accepted notions that privacy is a virtue meriting protection, personal data is likely to remain an essential element of nearly every legislative proposal connected to data and outsourcing. This focus relates, in large part, to public perceptions that privacy protections must be strengthened. For instance, “[a] February 2002 Harris Poll showed that 63% of respondents thought current law inadequate to protect privacy.”¹³⁹

Despite this seemingly broad consensus, some observers believe that privacy regulations may harm society, individuals, and business. Their rationale is that “information flows constitute a central part of our economic and social infrastructure, and that privacy laws—by interfering with those information flows—inevitably harm consumers and businesses”¹⁴⁰ For instance, use of personal data “greatly expanded the availability, increased the speed, and reduced the cost of consumer credit.”¹⁴¹ In a related context, studies have shown that “there does not appear to be actual evidence of harm to consumers from the legal use of information for marketing and advertising purposes.”¹⁴²

To ensure that vaguely framed privacy concerns do not overshadow consideration of other important uses of information, Professor Fred H. Cate, Professor of Law and Director of the Information Law and Commerce Institute at the Indiana University School of Law, suggests that

134. 47 U.S.C. § 227 (2000).

135. 15 U.S.C. §§ 1601–1608 (2000).

136. Pub. L. No. 108-10, 117 Stat. 557.

137. Pub. L. No. 99-508, 100 Stat. 1848 (codified in scattered sections of 18 U.S.C.).

138. 20 U.S.C. § 1232g (2000).

139. ELECTRONIC PRIVACY INFORMATION CENTER (EPIC), PUBLIC OPINION ON PRIVACY, at <http://www.epic.org/privacy/survey> (last updated July 15, 2004).

140. *Privacy in the Commercial World*, *supra* note 127, at 26 (prepared statement of Fred H. Cate, Director, Info. Law & Commerce Inst., Indiana Univ. Sch. of Law).

141. *Id.* at 19.

142. *Id.* at 51 (prepared statement of Paul H. Rubin, Professor of Economics & Law, Emory University).

policymakers ask “what public benefit justifies the government’s action?”¹⁴³ He argues that by considering of the beneficial uses of information, laws will adequately account for costs and benefits of including privacy protections.¹⁴⁴ Other scholars, such as Professor Eugene Volokh, view privacy-based legislation as implicating First Amendment concerns.¹⁴⁵ Although outside popular sentiment, the arguments against privacy regulations may be important factors for successful policies creating balance between privacy and other fundamental freedoms.

3. Common Law Privacy Protection May Be Used to Target Improper Offshore Outsourcing Arrangements

The use of common law and civil actions may be an effective means for private plaintiffs to secure relief when personal information has been used in an unauthorized manner. In this regard, actions grounded on theories of breach of implied contract, publication of private facts, breach of fiduciary duty, and intrusion upon seclusion may be effective methods for remedying damages incurred by those whose personal information has been compromised by offshore outsourcing arrangements. This particular combination of legal principles has been cited as constituting breach of confidence actions.¹⁴⁶ Conversely, some view the actions as involving two distinct legal mechanisms, invasion of privacy and breach of confidence.¹⁴⁷ Regardless of the classification, there is strong evidence that “American law is in the process of recognizing three distinct theories—contract, fiduciary duty and, perhaps, tort—which can be used to found an action against a confidant who reveals information.”¹⁴⁸

In *United States v. First National Bank*, for instance, a U.S. District Court pointed out that “[a]ll agree that a bank should protect its business records from the prying eyes of the public, moved by curiosity or malice.”¹⁴⁹ Similarly, other cases and treatises acknowledge that

143. *Id.* at 26 (prepared statement of Fred H. Cate, Director, Info. Law & Commerce Inst., Indiana Univ. Sch. of Law).

144. *Id.*

145. *See, e.g., id.* at 28 (prepared statement of Eugene Volokh, Professor of Law, UCLA Law Sch.) (“The difficulty is that the right to information privacy . . . is a right to have the government stop you from speaking about me. We already have a code of ‘fair information practices,’ and it is the First Amendment . . .”).

146. *See* Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1426 (1982) (noting that these theories have traditionally been used to redress disclosure of personal information when there is “an expectation that such matters will be held in strict confidence”).

147. Susan M. Gilles, *Promises Betrayed: Breach of Confidence as a Remedy for Invasions of Privacy*, 43 BUFF. L. REV. 1, 4 (1995).

148. *Id.* at 14–15.

149. 67 F. Supp. 616, 624 (S.D. Ala. 1946).

“[i]nviolate secrecy is one of the inherent and fundamental precepts of the relationship of the bank and its customers or depositors.”¹⁵⁰

Aside from banking, the breach of confidence argument has extended to doctor-patient relationships. In *Horne v. Patton*, the Alabama Supreme Court held that a physician’s disclosure of patient medical records is actionable under contract and tort principles.¹⁵¹ Using implied contract theory, the *Horne* court noted that a contract is formed from “mutual intent to contract according to the ordinary course of dealing between a physician and his patient.”¹⁵² Privacy in the doctor-patient context was also addressed in *Hammonds v. Aetna Casualty & Surety Co.*¹⁵³ The court noted that in making such a contract, a “doctor warrants that any confidential information gained through the relationship will not be released without the patient’s permission.”¹⁵⁴ The court also discussed invasion of privacy tort principles. The rationale was that because the patient-physician relationship necessitates full disclosure of personal information, “[t]he unauthorized revelation of medical secrets, or any confidential communication given in the course of treatment, is tortious conduct which may be the basis for an action in damages.”¹⁵⁵

While breach of confidence litigation only pertains to individual cases and involves discretionary determinations under state law, these actions may be a significant force for promoting new law and changes in corporate practice. However, “[b]efore a tort action could have any significant impact on information practices, it would need to be adopted in a critical mass of jurisdictions.”¹⁵⁶ This potential use and expansion of legal actions is foreseeable given the increasing necessity of disclosing particular personal data in order to engage in business transactions. In almost every context, from buying a book online to purchasing groceries, the transaction may require that personal data be passed along.¹⁵⁷ As in the financial and medical context, “[w]hen there is a restriction or it is implied from the terms of the consent or the circumstances, the consent may be regarded as conditioned upon the purpose.”¹⁵⁸ For example, personal information given to a tax preparation company might imply a restriction that the use of the information would be conditioned upon using it for purposes of tax return preparation.

150. *Peterson v. Idaho First Nat’l Bank*, 367 P.2d 284, 290 (Idaho 1961).

151. 287 So. 2d 824, 829–30 (Ala. 1973).

152. *Id.* at 831.

153. 243 F. Supp. 793 (N.D. Ohio 1965).

154. *Id.* at 801.

155. *Id.* at 802.

156. Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1313 (2000).

157. *Id.* at 1310.

158. RESTATEMENT (SECOND) OF TORTS § 892A cmt. g (1965).

Evidence already demonstrates that common law will apply to data collection and offshore outsourcing transactions. The U.S. Department of Commerce acknowledged this possibility in a 2000 letter to the European Commission, stating: "The right to recover damages for invasion of personal privacy is well established under U.S. common law."¹⁵⁹ Moreover, the use of common law, in general, to address legal issues in order to address social problems, environmental concerns, and new technology is well-founded in American jurisprudence. Past cases show that courts have been "more likely to invoke [public] policy when making or seriously considering new law."¹⁶⁰

In particular, products liability and environmental law developed largely from decisions expanding on common law principles. For instance, prior to 1900 most courts would not award damages to a victim of a product injury unless they were in contractual privity with the defendant.¹⁶¹ However, judicial activism in landmark state court cases prompted change, with courts applying negligence, and eventually strict liability, in products liability actions.¹⁶²

Similarly, in the environmental context "[t]he early origins of environmental law can be traced from private tort and trespass remedies at common law."¹⁶³ For instance, private nuisance, as a cause of action, is aimed at remedying substantial and unreasonable interference with the use and enjoyment of land.¹⁶⁴ Private legal action became a mechanism for regulating pollutants such as noxious gas emissions.¹⁶⁵ Early nuisance cases connected the impact on land and crops to the pollutant emission, calculating damages based on fair market values for rental or crop production.¹⁶⁶ Although effective for remedying some past environ-

159. Declan McCullagh, *Database Nation: The Upside of "Zero Privacy"*, REASON, June 1, 2004, 2004 WLNR 9590954.

160. James A. Henderson, Jr., *Judicial Reliance on Public Policy: An Empirical Analysis of Products Liability Decisions*, 59 GEO. WASH. L. REV. 1570, 1612 (1991).

161. Robert L. Rabin, *Tort Law in Transition: Tracing the Patterns of Sociolegal Change*, 23 VAL. U. L. REV. 1, 7 (1988).

162. See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053 (N.Y. 1916) (applying the negligence standard to a products liability action by a consumer against an automobile manufacturer); *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1963) (adopting strict liability for injuries due to defective products). *Greenman* marked a nationwide movement for the rejection of negligence in favor of a strict liability standard, as well as new statutory reforms. Rabin, *supra* note 161, at 9.

163. JOHN E. BONINE & THOMAS O. MCGARITY, *THE LAW OF ENVIRONMENTAL PROTECTION*, xx (1984).

164. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* §§ 87-88 (5th ed. 1984).

165. See, e.g., *Morgan v. High Penn Oil Co.*, 77 S.E.2d 682, 690 (N.C. 1953) (holding that the plaintiffs' allegations of a private nuisance based on emissions of noxious gases and odors were sufficient to withstand the oil refinery's motion for a compulsory nonsuit).

166. See, e.g., *United Verde Copper Co. v. Ralston*, 46 F.2d 1, 2 (9th Cir. 1931) ("The

mentally unsound conduct, nuisance actions were incomplete solutions because "nuisances are defined legally in terms of individual rights, not environmental or social concerns."¹⁶⁷ Moreover, nuisance failed to assist all victims or respond when the costs of environmental harm were "below the cost of judicial prosecution."¹⁶⁸ Despite these imperfections, environmental statutes and regulations were inspired by the early cases and the corresponding "rise of an environmental consciousness in the late nineteenth and early twentieth century."¹⁶⁹ Yet, even with modern statutes, the conceptual flexibility inherent in tort doctrines remains useful for resolving particularly unique, complicated situations.¹⁷⁰

Like other branches of law originating in common law, advocates for privacy protection might argue that offshore outsourcing is within the purview of Restatement (First) of Torts § 867: "[a] person who unreasonably and seriously interferes with another's interest in not having his affairs known to others or his likeness exhibited to the public is liable to the other."¹⁷¹ If courts begin to apply tort law invasion of privacy to offshore outsourcing, a primary issue will be establishing that the defendant corporation's decision to disclose information caused damages. Thus, "[t]he focus of the tort remedy is not the defendant's breach but the injury the speech causes to the plaintiff."¹⁷² These damages could include injury to the plaintiff's emotional state and reputation along with typical economic injuries. Accordingly, plaintiffs in tort litigation must show some type of damage in order to secure relief from the unauthorized disclosure to an offshore entity.

measure of damages for loss of a growing crop . . . is to allow for the value of the probable yield under proper cultivation when matured and ready for market, less the estimated expense of producing, harvesting, and marketing. A similar rule is applicable in determining rental value" (citations omitted); *E. Rauh & Sons Fertilizer Co. v. Shreffler*, 139 F.2d 38, 42 (6th Cir. 1943) ("[T]he real measure of damage is the injury to the crop at the time it is inflicted, measured by its difference in value before and after injury.").

167. David A. Westbrook, *Liberal Environmental Jurisprudence*, 27 U.C. DAVIS L. REV. 619, 633 (1994); see also *Fontainebleau Hotel Corp. v. Forty-five Twenty-five Inc.*, 114 So. 2d 357, 359 (Fla. Dist. Ct. App. 1959) (finding "no legal right to the free flow of light and air" unless there is "some contractual or statutory obligation").

168. Westbrook, *supra* note 167, at 647.

169. *Id.* at 622.

170. See, e.g., *id.* at 643 (referring to the use of tort doctrines by plaintiffs following the Exxon Valdez oil spill).

171. RESTATEMENT (FIRST) OF TORTS § 867 (1939); see also Phillip E. Hassman, Annotation, *Publication of Address as Well as Name of Person as Invasion of Privacy*, 84 A.L.R.3d 1159, 1159 (1978) (stating that according to the Restatement (Second) of Torts, "one's privacy may be invaded by (1) an intrusion upon that person's seclusion, (2) appropriation of his name or likeness, (3) publicity to his private life, or (4) publicity placing him in a false light").

172. Gilles, *supra* note 147, at 62.

By contrast, “the wrong that contract law seeks to remedy is not that the information revealed hurts the confider, but that the revelation is a breach of the parties’ agreement.”¹⁷³ Therefore, contract damages will usually exclude emotional distress and injury to reputation.¹⁷⁴ This is because contractual damages are typically limited to those foreseeable by the parties at the time of contracting.¹⁷⁵

4. State Privacy Laws

Supplementing the web of federal government privacy legislation, state governments have promulgated numerous laws relating to privacy. Among the states, California is known for having the most laws relating to privacy protection.¹⁷⁶ Due to the state’s forerunner status, there have already been a number of legal challenges and significant academic focus directed toward the structure and administration of California privacy protection law. Thus, understanding the effectiveness of privacy legislation in California may provide the most complete illustration of how states can implement policies framed on privacy protection rationales.

Several California privacy laws enhance protections included in federal law and other state legislation.¹⁷⁷ For instance, the California Financial Information Privacy Act prohibits financial service companies from sharing nonpublic personal information without first gaining the consumer consent through an opt-in process.¹⁷⁸ The opt-in requirement is considered to be a stricter standard than required under the Gramm-Leach-Bliley Act. If this law and other state privacy laws withstand legal challenges, many states are likely to follow California’s lead.

In 2000 alone, “there were more than 300 on-line privacy bills, aimed at the use of personal data, pending in state legislatures.”¹⁷⁹ Vermont, Massachusetts, California, and North Dakota have already enacted new laws providing for stronger financial privacy rights.¹⁸⁰ Similarly, in other

173. *Id.* at 38–39.

174. *Id.* at 38.

175. *See, e.g.*, Hadley v. Baxendale, 156 Eng. Rep. 145, 151 (Ex. 1854) (describing the damages for a breach of contract as those damages that arise naturally from the breach “or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it”).

176. Nicholson, *supra* note 73, at 9.

177. *Id.*

178. CAL. FIN. CODE § 4053 (West 2004).

179. Jane Kaufman Winn & James R. Wrathall, *Who Owns the Customer? The Emerging Law of Commercial Transactions in Electronic Customer Data*, 56 BUS. LAW. 213, 254 (2000).

180. Chris Hoofnagle, *Make Privacy Rights Paramount—Congress Must Not Prevent States from Protecting Bank and Credit Card Customers*, STAR-LEDGER (Newark, N.J.), Sept. 16, 2003, 2003 WL 18729120.

contexts, states' proposals for new specialized privacy legislation have increased.¹⁸¹ For example, Virginia enacted the Personal Information Privacy Act, which requires merchants to give notice to customers before selling personal data and precludes the sale of "information gathered solely as the result of any customer payment by personal check, credit card, or where the merchant records the customer's driver's license number."¹⁸²

Based on the wide public acceptance and demonstrated willingness of states to enact privacy legislation, state law constructed on privacy protection rationales will be a likely avenue for targeting offshore outsourcing. This trend is further evinced by the willingness of federal legislators to allow and, in some cases, even encourage greater protection at the state level. The Gramm-Leach-Bliley Act exemplifies this type of federal enactment, stipulating that "a State statute, regulation, order, or interpretation is not inconsistent with the provisions of this subchapter if the protection such statute, regulation, order, or interpretation affords any person is greater than the protection provided under this subchapter."¹⁸³

With such a provision, federal preemption is only possible when "laws actually conflict with or are inconsistent with the federal law and then only to the extent of the inconsistency."¹⁸⁴ However, state privacy laws designed to impact offshore outsourcing may be viewed as impermissibly interfering with the federal government's foreign affairs power.

The U.S. Supreme Court has subjected state laws affecting foreign commerce to even higher scrutiny. For instance, in discussing state taxation on certain international transactions the Supreme Court emphasized that "[e]ven a slight overlapping of tax—a problem that might be deemed *de minimis* in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned."¹⁸⁵ Thus, when state laws touch on foreign commerce, the Court focuses on whether the law poses a threat to the federal government's ability to "speak with one voice" and whether impairment to

181. See BBBO^NLINE, INC. & COUNCIL OF BETTER BUS. BUREAUS, INC., A REVIEW OF FEDERAL AND STATE PRIVACY LAWS 11–14, at http://www.bbbonline.org/UnderstandingPrivacy/library/fed_statePrivLaws.pdf (last visited Mar. 29, 2005) (summarizing specialized state privacy legislation relating to genetic information, employment records, and other topics).

182. VA. CODE ANN. § 59.1-442 (Michie 2004).

183. 15 U.S.C. § 6807(b) (2000).

184. Elizabeth A. Huber & Elena A. Lovoy, *Update on State Consumer Financial Privacy Legislation and Regulation*, 59 BUS. LAW. 1227, 1237 (2004); see also SHANNON KLINGER & M. LYNN SYKES, NAT'L FOUND. FOR AM. POL'Y, EXPORTING THE LAW: A LEGAL ANALYSIS OF STATE AND FEDERAL OUTSOURCING LEGISLATION 7 (2004) (citing various courts' concerns with state intrusion on foreign policy), available at http://www.nfap.net/researchactivities/studies/NFAPStudyExportingLaw_0404.pdf.

185. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 456 (1979).

federal uniformity is substantial.¹⁸⁶ If the risk that foreign commerce will be burdened by inconsistent regulation is remote, the Court is more likely to uphold state regulation.¹⁸⁷

Federal preemption challenges may impact state legislation even when the subject matter is unrelated to foreign commerce. In an effort to prevent California's Financial Information Privacy Act from coming into effect on July 1, 2004, several banking associations alleged that the law was preempted by provisions in the Fair Credit Reporting Act and the Gramm-Leach-Bliley Act. The challenge was rejected on June 30, 2004 in *American Bankers Association v. Lockyer*,¹⁸⁸ allowing the law to go into effect.¹⁸⁹ If other courts follow the logic embodied in *Lockyer*, it is likely that states will target offshore outsourcing as an issue of personal privacy. However, if new state laws touch upon foreign commerce or explicitly contradict federal law, the likelihood of withstanding a challenge is significantly lessened.

5. Private Sector Certification and Professional Regulations

Private certification systems, codes of ethics, and seals of approval have long been used to demonstrate adherence to a prescribed level of quality. When properly implemented, such systems seek to ensure that "professionals will regulate themselves with but one objective—advancing the public interest in the area in which they practice."¹⁹⁰ Professional regulation has traditionally referred to mechanisms established by physicians, lawyers, and others in the learned professions to govern their behavior.¹⁹¹ Generations of medical doctors, for instance, have pledged to abide by a professional ethics code when taking the Hippocratic Oath. In effect, a portion of the Oath creates a profession-wide guarantee for privacy

186. *Id.* at 449 (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)).

187. *See* *Bob-Lo Excursion Co. v. Michigan*, 333 U.S. 28, 37 (1948) (finding that a state law that is neither "out of harmony" nor inconsistent with federal policy in its regulation of trade with another nation is an acceptable exercise of state power).

188. *Am. Bankers Ass'n v. Lockyer*, No. C.V.S. 04-0778 MLE KJ, 2004 WL 1490432, at *6 (E.D. Cal. June 30, 2004).

189. Bob Egelko, *State Privacy Law Challenged By U.S.: Costs, Uniformity Cited In Argument*, S.F. CHRON., Aug. 12, 2004, at B3. The *Lockyer* court held that plaintiffs must make one of two basic showings in order to maintain a federal preemption challenge: (i) "that Congress has explicitly defined the extent to which its enactments displace state law" or (ii) "that preemption should occur because federal regulation on the subject is 'so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.'" *Id.* at *2 (quoting *Bank of Am. v. City & County of San Francisco*, 309 F.3d 551, 558 (9th Cir. 2002)).

190. Jack R. Bierig, *Whatever Happened to Professional Self-Regulation?*, 69 A.B.A. J. 616, 617 (1983).

191. *Id.*

protection: "All that may come to my knowledge in the exercise of my profession or outside of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal."¹⁹² Likewise, the American Medical Association (AMA) reiterates a similar privacy protection guarantee in section 5.05 of the AMA Code of Ethics: "The information disclosed to a physician during the course of the relationship between physician and patient is confidential to the greatest possible degree."¹⁹³

Attorneys have similar ethical obligations. In nearly every state and U.S. territory, attorneys must pass a separate test evincing knowledge of the Model Rules of Professional Conduct (Model Rules) and pledge their adherence to the Model Rules before gaining admission to practice law.¹⁹⁴ A longstanding obligation under the Model Rules is the protection of confidential information.¹⁹⁵ When client confidentiality is breached, state bar associations have enforced violations by disbaring the attorney.¹⁹⁶ This enforcement mechanism is particularly important for terminating practices of incompetent or unscrupulous practitioners well before market forces do so.¹⁹⁷

The use of professional codes has become increasingly common in professions other than law and medicine. In maintaining a code of professional ethics, the Information Systems Audit and Control Association (ISACA) exemplifies this trend. The ISACA is a global organization for information governance, control, security and auditing professionals. The standard of privacy stipulated by the ISACA's Code requires members to "[m]aintain the privacy and confidentiality of information obtained in the course of their duties unless disclosure is required by legal authority."¹⁹⁸ In enforcing the obligation, the ISACA warns members that "[f]ailure to comply with this Code of Professional Ethics can result in an investigation into a member's, and/or certification holder's conduct and, ultimately, in disciplinary measures."¹⁹⁹ By using various forms of self-regulation,

192. STEDMAN'S MEDICAL DICTIONARY 717 (25th ed. 1989) (defining Hippocratic Oath).

193. CODE OF MED. ETHICS § 5.05 (AMA Council on Ethical and Judicial Affairs, 1998–99 ed., 1998).

194. See, e.g., NATIONAL CONFERENCE OF BAR EXAMINERS, Multistate Professional Responsibility Examination, at <http://www.ncbex.org/tests/mpre/mpretxt.htm> (last visited Mar. 29, 2005) (providing information on the Multistate Professional Responsibility Exam).

195. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003) (discussing the confidentiality of information).

196. See, e.g., *In re Pool*, 517 N.E.2d 444 (Mass. 1988) (describing the disbarment of an attorney who revealed confidential information to the police resulting in the recovery of incriminating evidence against his client).

197. Bierig, *supra* note 190, at 617.

198. ISACA, CODE OF PROF'L ETHICS, at <http://www.isaca.org/template.cfm?template=/ContentManagement/ContentDisplay.cfm&ContentID=4904> (last visited Apr. 19, 2005).

199. *Id.*

professionals can benefit by enhancing consumer confidence in their work. Accordingly, some observe that “the necessity for trust is the foundation of professional self-regulation.”²⁰⁰ Likewise, by pledging to maintain privacy in the offshore outsourcing context, those who adhere to professional ethics and self-regulation may assuage concerns of privacy abuses.

In order to avoid antitrust challenges when devising new self-regulatory programs, professional organizations should be cognizant of the effects on competition. If a regulation can be viewed as price-fixing, it is illegal.²⁰¹ Even if a regulation is not within the per se price fixing rule, “self-regulation by professionals is unlawful if it impedes competition, regardless of whether it also may upgrade the quality of care or otherwise advance the public interest!”²⁰² The Supreme Court described the legal inquiry in *Board of Trade v. United States*:

Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.²⁰³

Because most professional regulations and ethical codes would merely regulate competition, antitrust issues are less likely. However, standards may become “unlawful if they discriminate against individuals or products for anticompetitive purposes or for reasons unrelated to their ostensible objectives.”²⁰⁴

The idea of private regulation or certification has been applied in contexts beyond specialized professions. For instance, the Better Business Bureau (BBB) has developed a privacy seal that it issues “to businesses that have proven to meet the high standards set in the program requirements.”²⁰⁵ The BBB program is marketed to businesses on the notion that it will produce increased consumer confidence. The BBB privacy seal program requires “posting of an online privacy notice meeting rigorous privacy principles,” “completion of a comprehensive privacy assessment,” “monitoring and review by a trusted organization,” and

200. Bierig, *supra* note 190, at 617.

201. *See, e.g., id.* at 618 (referring to *Arizona v. Maricopa County Med. Soc’y*, 457 U.S. 332 (1982), in which the Supreme Court held that price-fixing arrangements by professional associations constitute violations of the antitrust laws).

202. *Id.*

203. 246 U.S. 231, 238 (1918).

204. Bierig, *supra* note 190, at 618.

205. COUNCIL OF BETTER BUS. BUREAUS, INC., BBBONLINE PRIVACY SEAL, at <http://bbbonline.com/privacy> (last visited Apr. 19, 2005).

“participation in the programs [sic] consumer dispute resolution system.”²⁰⁶

The BBB program also has the additional benefit of allowing participants to partake in the Japanese Privacy Seal authority (JIPDEC) program.²⁰⁷ By including JIPDEC certification, Ken Hunter, President and CEO of the Council of Better Business Bureaus, points out that “[i]t will no doubt be helpful to consumers to find a trusted and well-known mark on the web site of a foreign and less well-known, or even unknown, business.”²⁰⁸ In addition to the BBB programs, other companies have emerged to offer similar seal and certification programs. The most well-known is TRUSTe, a company touting its service for companies to “make privacy your choice.”²⁰⁹

Despite the potential benefits of private certification and seal programs, critics have found e-commerce privacy seals do not actually signify stringent privacy protections. Instead, “[a]ll that a Truste or Bbbonline seal indicates is that a site complies with certain fair information practice principles, like notifying visitors of how their personal information will be used.”²¹⁰ Moreover, in an August 2000 incident, “Truste violated its own privacy policy by placing small Internet-tracking files, called cookies, on the computer hard drives of visitors to the Truste site.”²¹¹ Weak enforcement and limited use of privacy seals by websites have also been factors undermining the efficacy of private certification.²¹²

Although privacy seal programs may not offer a complete solution for regulating use of personal information, Privacy Commissioners in Australia and Ontario, Canada issued a joint report indicating “[s]eals could come into their own as a powerful facilitator of globalization of consumer transactions if indeed they are able to provide acceptable and enforceable privacy protection across jurisdictions.”²¹³ The commissioners cite two

206. *Id.*

207. COUNCIL OF BETTER BUS. BUREAUS, INC., BBBONLINE JAPANESE PRIVACY SEAL, at <http://bbbonline.com/privacy/jipdec.asp> (last visited Apr. 19, 2005).

208. Press Release, Council of Better Bus. Bureaus, Inc., New Online Privacy Protection Tool to Transcend Borders: BBBOnLine and Japanese Privacy Seal Program (JIPDEC) Announce Plans for Joint Online Privacy Seal Venture (May 18, 2000), at <http://bbbonline.com/about/press/2000/051800.asp>.

209. TRUSTE, WHAT'S THE DIFFERENCE BETWEEN YOU AND YOUR COMPETITION?, at http://truste.com/businesses/web_privacy_seal.php (last visited Apr. 19, 2005).

210. Joel Rothman, *When You Can't Trust The Privacy Police*, BROWARD DAILY BUS. REV., Nov. 28, 2000, at 1.

211. *Id.*

212. See, e.g., Edmund Sanders, *Privacy Certification Earning Seal of Disapproval*, CHIC. TRIB., Nov. 16, 2000, at C4 (describing the small number of customers that BBBOnLine and TRUSTe have, as well as their lax methods of ensuring that those customers do not improperly use the gathered information).

213. ANN CAVOUKIAN & MALCOLM CROMPTON, WEB SEALS: A REVIEW OF ONLINE PRIVACY PROGRAMS § 5.2 (2000), at <http://www.privacy.gov.au/publications/seals.html>.

areas for improvement: (1) “seals need to gain acceptance among consumers on the Web,” and (2) objective assessment should be conducted to determine “the extent to which seals provide acceptable and enforceable privacy protection.”²¹⁴

There is little dispute that privacy seals and ethical codes sometimes fail to achieve their desired ends, instead serving professional or corporate self-interest rather than fostering public good.²¹⁵ This has not, however, rendered these private mechanisms dead for the purpose of pursuing positive change. By evincing a social good such as the maintenance of privacy safeguards, “labelling programmes appear to stimulate social concern among enterprise and consumers and provide a market-based financial (rather than regulatory) incentive to improve labour conditions.”²¹⁶

In describing effective private labeling systems, Jorge Larson Guerra, Coordinator of the Collective Biological Resources, National Commission for the Knowledge and Use of Biodiversity, Mexico, states that “[l]abeling principles are closely tied to those of trade marks: to be non deceiving, informative and to allow for the identification of the producer of a product.”²¹⁷ A widely cited example is the dolphin-safe tuna labeling used as a mechanism to influence changes in industry fishing practices.²¹⁸

By assessing the successes and failures of private labeling and ethical codes, businesses engaging in offshore outsourcing could devise a system to certify adherence to privacy safeguards. If consumers demonstrated preferences toward financial, telecommunication, and health care providers, for example, that pledged adherence to ethical codes or certification labels, this could generate structural changes in offshore outsourcing arrangements. Moreover, consumers may begin to value enhanced protections as a premium feature much like organic food and fairly traded coffee.

6. The European Privacy Directive and Other International Laws

The European Union Data Protection Act bars “transfer of personal

214. *Id.*

215. Bierig, *supra* note 190, at 618.

216. SELF-REGULATION IN THE WORKPLACE: CODES OF CONDUCT, SOCIAL LABELING AND SOCIALLY RESPONSIBLE INVESTMENT 46 (Michael Urminsky ed., Int’l Labour Office, MCC Working Paper No. 1, 2001), available at http://www.ilo.org/dyn/empent/docs/F1936481553/1_mcc_wp.pdf.

217. JORGE LARSON GUERRA, LABELS THAT TELL STORIES: BUILDING BRIDGES BETWEEN PRODUCERS AND CONSUMERS 1 (Ecolabelling Public Symposium at WTO, June 2003), available at http://www.wto.org/english/tratop_e/dda_e/symp03_larson_e.pdf.

218. Gilbert Bankobeza et. al., *Environmental Law—Year in Review*, 2003 A.B.A. SEC. INT’L L. REP. 14, at http://www.abanet.org/intlaw/divisions/public/yir_environmental.pdf.

information from European Union countries to another country *unless* that country's laws have been certified by the EU as providing 'adequate' protection of the personal data."²¹⁹ So far, the EU has designated Canada, Argentina, Hungary, and Switzerland as providing adequate protection of personal data.²²⁰

Because most countries do not have data protection laws satisfying EU standards, offshore outsourcing arrangements dealing with personal data from individuals in EU member states are susceptible to legal challenges. For example, Lloyds TSB Group Union filed suit against Lloyds TSB, alleging violations of the Data Protection Act for the bank's decision to outsource work to India.²²¹ The union argued that India does not have the standards of data protection required by British laws and, therefore, the arrangement puts customers' records at risk.²²² The penalties for violating an EU member state's data protection law can be significant. In the UK, the Information Commissioner may impose unlimited fines upon companies for ignoring the Act.²²³ In addition, "an individual who suffers as a result of their personal data, such as credit card details or addresses, being leaked" may file a lawsuit.²²⁴

With an increasing emphasis on privacy, the threat of enforcement actions by EU member states looms over entities engaged in transactions involving personal data from the EU. Evidence suggests that the data protection laws regulate an expansive range of activities and are aggressively enforced. For instance, a recent European Court of Justice opinion in "Case C-101/01 Criminal Proceedings against Bodil Lindqvist" indicates that "posting personal data on the Internet amounts to processing personal data for the purposes of the Data Protection Directive."²²⁵ In light of this decision, "Norway's data protection authorities recently announced that they would be pursuing web site operators that display photos that were taken of individuals without their prior consent."²²⁶ Because the European privacy framework will shape the global business environment,

219. John Nicholson, *US Response to EU Data Protection—Safe Harbor, Legal Issues in Offshore Outsourcing* 16, in CLE PROGRAM—LEGAL RISKS OF OUTSOURCING ABROAD (2004 A.B.A. Sec. Int'l L. & Prac. Annual Meeting).

220. Barbara Yuill, *Privacy: European Data Protection Law Seen As Spilling into Latin America*, 74 Daily Rep. for Executives C-4 (BNA) (Apr. 17, 2003).

221. Jill Treanor, *Union Claims Lloyds Outsourcing Breaches Data Laws*, GUARDIAN (London), Aug. 18, 2004, at 26.

222. *Id.*

223. *Half of UK Companies Are Ignoring Data Protection Risks When Outsourcing*, M2 PRESSWIRE, Mar. 22, 2004, LEXIS, M2PressWIRE File.

224. *Id.*

225. Jacqueline Klosek, *European Court Establishes Broad Interpretation Of Data Privacy Law*, METRO. CORP. COUNS., Mar. 2004, at 22, available at <http://s106604692.onlinehome.us/pdfs/2004/March/22.pdf>.

226. *Id.*

entities structuring an offshore outsourcing arrangement should take possible new developments into account.

a. EU-U.S. Safe Harbor

Because the U.S. approach to data protection differs from the European model, the EU Privacy Directive “could have significantly hampered the ability of U.S. companies to engage in many trans-Atlantic transactions.”²²⁷ However, as a result of consultations between the U.S. Department of Commerce (DOC) and the European Commission, the European Commission issued a decision on July 26, 2000 “recognising the Safe Harbour international privacy principles, issued by the US Department of Commerce, as providing adequate protection for the purposes of personal data transfers from the EU.”²²⁸ This voluntary certification process allows U.S. companies to be deemed as providing adequate data protection.

For U.S. companies to qualify for the EU Safe Harbor program, they must self-certify to the DOC that they: (1) have joined a self-regulatory organization that adheres to the safe harbor principles, (2) have implemented appropriate self-regulatory privacy policies, or (3) are subject to a body of law that protects personal privacy in a manner consistent with the EU Privacy Directive.²²⁹ The program requires adherence to seven privacy principles: “notice, choice, onward transfer, security, data integrity, access, and enforcement . . .”²³⁰ Each of these principles could significantly impact offshore outsourcing arrangements.

The “onward transfer” principle, for example, stipulates that:

[w]here an organization wishes to transfer information to a third party that is acting as an agent . . . it may do so if it first either ascertains that the third party subscribes to the Principles or is subject to the Directive or another adequacy finding or enters into

227. U.S. DEP’T OF COMMERCE, WELCOME TO THE SAFE HARBOR, *available at* <http://www.export.gov/safeharbor/> (Dec. 16, 2004).

228. COMM’N OF THE EUROPEAN COMMUNITIES, THE APPLICATION OF COMMISSION DECISION 520/2000/EC OF 26 JULY 2000 PURSUANT TO DIRECTIVE 95/46 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON THE ADEQUATE PROTECTION OF PERSONAL DATA PROVIDED BY THE SAFE HARBOUR PRIVACY PRINCIPLES AND RELATED FREQUENTLY ASKED QUESTIONS ISSUED BY THE US DEPARTMENT OF COMMERCE 2 (Commission Staff Working Paper, Feb. 13, 2002), *available at* http://www.europa.eu.int/comm/internal_market/privacy/docs/adequacy/sec-2002-196/sec-2002-196_en.pdf.

229. *The EU Data Protection Directive: Implications for the U.S. Privacy Debate: Hearing Before the House Subcomm. on Commerce, Trade, and Consumer Protection of the Comm. on Energy and Commerce*, 107th Cong. 57 (2001) (prepared statement of Jonathan M. Winer, Alston & Bird LLP) [hereinafter *Data Protection Hearing*].

230. *Id.*

a written agreement with such third party requiring that the third party provide at least the same level of privacy protection as is required by the relevant Principles.²³¹

The DOC explains this particular standard as imposing “on-going responsibility for data transferred pursuant to the Safe Harbor.”²³² Accordingly, if the U.S. Safe Harbor participant transfers data to a third party that does not meet one of the three elements set forth in the onward transfer principle, it would be liable for any improper data processing.

For instance, the EU Safe Harbor may have the effect of creating a uniform standard for U.S.-based multinational corporations. The choices of Hewlett Packard (HP), a major U.S. technology corporation, reflect this theory. According to Barbara Lawler, Customer Privacy Manager for HP, the company “applies a universal, global privacy policy built on the fair information practices: notice, choice, accuracy & access, security and oversight. Whether in English, French or Spanish, the core commitments are the same, with minimal localization required to reflect local country laws.”²³³ The decision to participate in the Safe Harbor means that the organization must apply the principles to covered data for as long as it stores, uses, or discloses the data, even if it subsequently leaves the Safe Harbor.

b. EU Model Contracts

In 2001, the European Commission implemented a new arrangement whereby firms can satisfy the “adequate protection” standard stipulated under the EU Privacy Directive by using certain model contract provisions.²³⁴ The basic model contract scheme involves the use of “standard contractual clauses [that] contain a legally enforceable declaration (‘warrant’) whereby both the ‘Data Exporter’ and the ‘Data Importer’ undertake to process the data in accordance with basic data protection rules and agree that individuals may enforce their rights under the contract.”²³⁵ These requirements mean EU substantive privacy laws

231. U.S. DEP’T OF COMMERCE, SAFE HARBOR WORKBOOK, *available at* http://www.export.gov/safeharbor/sh_workbook.html (last updated June 29, 2004).

232. *Id.*

233. *Data Protection Hearing*, *supra* note 229, at 78 (statement of Barbara Lawler, Manager, Customer Privacy, Hewlett-Packard Co.).

234. U.S. DEP’T OF COMMERCE, MODEL CONTRACT INFORMATION, *available at* http://www.export.gov/safeharbor/sh_modelcontract.html (last visited Apr. 19, 2005).

235. Press Release, European Comm’n, Data Protection: Commission Approves Standard Contractual Clauses for Data Transfers to Non-EU Countries (June 18, 2001), *available at* <http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/01/851&format=HTML&aged=1&language=EN&guiLanguage=en>.

would apply to a firm's operations extraterritorially, allowing EU member states to exercise jurisdiction over the transaction, including authority to audit the firm's facilities.²³⁶ Moreover, firms would also be compelled "*to accept joint and several liability, as well as the right of all data subjects whose data is exported from the EU to sue for alleged violations.*"²³⁷ The primary benefit of the model contract method of compliance is that it allows participation by firms regardless of their global locations.

Although model contracts were ostensibly designed to facilitate transactions subject to the EU Data Directive, the consensus among U.S. government officials and business leaders is that this method of compliance may hamper global transactions. For instance, DOC staff comments emphasize "deep concern that the model contract would impose highly burdensome requirements."²³⁸ Others have also noted that "*in some respects, the Model Contracts go beyond the literal requirements of the Directive itself, and . . . would impose entirely new obligations on Data Importers.*"²³⁹

c. Global Response to the EU Privacy Directive Shows That Imposing High Standards Can Generate Improvements in Foreign States

Instead of rejecting the extraterritorial aspects of the European framework, many countries have looked at the directive as a basis for reforming their own domestic law. So far, a number of non-EU countries—including Argentina, Australia, Canada, Hong Kong, Hungary, New Zealand, and Switzerland—have passed data protection laws similar to those of the EU.²⁴⁰ With the increased global acceptance, it is likely that more nations will opt to follow the European privacy approach in order to remain competitive. For example, business leaders in India stress that once an Indian "data protection law is framed, then the comfort level of companies from EU will go up while dealing with Indian firms."²⁴¹ Following these concerns, one Indian government official indicated that legislators have "found the EU data privacy rules to be most comprehensive and our legislation will be more or less based on the EU

236. *Data Protection Hearing*, *supra* note 229, at 62 (prepared statement of Jonathan M. Winer, Alston & Bird LLP).

237. *Id.*

238. U.S. DEP'T OF COMMERCE, *DOC Staff Comments on the Model Contract Provisions*, available at http://www.export.gov/safeharbor/DOCStaff_Comments.htm (last visited Apr. 19, 2005).

239. *Data Protection Hearing*, *supra* note 229, at 64 (prepared statement of Jonathan M. Winer, Alston & Bird LLP).

240. *Id.* at 65 (prepared statement of Jonathan M. Winer, Alston & Bird LLP).

241. *Privacy: India Drafting EU-Style Data Privacy Bill—Seeks to Attract Business from Europe*, 104 Daily Rep. for Executives A-18 (BNA) (May 30, 2003).

model.”²⁴²

Increasing global acceptance of the rigorous European privacy standards is evidence that social goals can be structured as conditions for market access and competition. By tying various societal benefits to typical business regulations, economically powerful states may induce outside entities to rise to the higher standard because of interest in taking advantage of the market opportunities available after compliance.

This has already occurred with some domestic reforms implemented in the United States. For example, with regard to financial securities and corporate governance, the United States imposed regulations that prompted foreign states and businesses to modify their practices in order to take advantage of opportunities available by participating in U.S. domestic transactions. Although the Sarbanes-Oxley Act was aimed toward addressing domestic concerns over U.S. corporate financial scandals, “the global importance of the American capital markets gives it a trans-national footprint.”²⁴³ In this regard, corporate governance experts observe that

many European companies are quietly adhering to the Sarbanes-Oxley provisions—even firms without shares traded on Wall Street, which would not have to do so. The U.S. rules have become a standard of sorts, even as most European countries overhaul or create their own corporate governance codes and review their oversight of the accounting industry.²⁴⁴

For example, “Petrobras recently consulted the [New York Stock] Exchange’s code of ethics when revising its own code, even though, as a non-U.S. issuer, it is not required to adopt the model.”²⁴⁵ Evidence suggests that global acceptance of the U.S. standard is connected with a desire to enhance corporate images and access U.S. markets. By embracing the higher standard, “many non-U.S. CEOs say they expect the effort of meeting the Sarbanes-Oxley Act will pay dividends in the form of renewed investor confidence in the capital markets.”²⁴⁶

The fact that the Sarbanes-Oxley Act and the EU Data Privacy Directive involve different issues demonstrates that wide-ranging domestic reform measures can be used to shape global practices. Accordingly, if the

242. *Id.*

243. Chris Charter, *What’s Good For The Goose—Extra-Territorial Application of The Sarbanes-Oxley Act*, MONDAQ BUS. BRIEFING, Sept. 9, 2004, 2004 WLNR 12300455.

244. Eric Pfanner, *Globalizing Corporate Reform: Despite Friction, Trans-Atlantic Codes Increasingly Converge*, INT’L HERALD TRIB., Sept. 27, 2003, at 1.

245. Randy Myers, *The Global Stance on Sarbanes-Oxley*, NYSE MAGAZINE, Sept./Oct. 2003, at 30, 32, available at http://www.nyse.com/pdfs/nysemag-3_sept_oct.pdf.

246. *Id.* at 30–31.

United States or European Union were to issue comprehensive regulations for offshore outsourcing, it could have the effect of creating a global standard willingly accepted by businesses. As with the global reaction to Sarbanes-Oxley, offshore outsourcing businesses could view adherence to heightened standards as a tool for enhancing consumer confidence and evincing quality.

B. Labor Rights

In some situations, businesses seek offshore outsourcing arrangements for reasons other than securing low-cost labor. One such reason is the ease of “operating on a 24-hour, 7-day schedule across numerous time zones.”²⁴⁷ Although quality enhancement is sometimes a primary concern, numerous studies readily acknowledge the key attraction of offshore outsourcing is reduced labor expenses.²⁴⁸ By taking advantage of lower wages and surplus labor conditions abroad, overall savings can be as high as ninety percent.²⁴⁹ Moreover, “[e]mployees working in foreign countries for U.S. companies are generally not covered by U.S. employment laws, which cover such issues as sexual harassment, age discrimination and worker safety.”²⁵⁰ By focusing on savings connected with poor labor standards, offshore outsourcing is sometimes portrayed as a race to the bottom where “global labor standards are undermined and all workers suffer.”²⁵¹

To acknowledge multifaceted labor issues and competing arguments for business competitiveness, new offshore outsourcing policies should balance several competing issues: (1) ensuring basic rights, poverty reduction, and labor standards for global labor, (2) protecting local jobs and providing readjustment for domestic labor, and (3) fostering increased business efficiency and higher productivity. By recognizing that business competitiveness is not inherently adverse to the right of workers to security and equal opportunities, regulations for offshore outsourcing may be structured to benefit labor as well as multinational companies.

247. U.S. GOV'T ACCOUNTABILITY OFFICE, PUB. NO. GAO-04-932, INTERNATIONAL TRADE: CURRENT GOVERNMENT DATA PROVIDE LIMITED INSIGHT INTO OFFSHORING OF SERVICES 13 (Sept. 2004), at <http://www.gao.gov/cgi-bin/getrpt?GAO-04-932>.

248. *E.g.*, *id.* at 11 (“[t]he primary reason organizations engage in offshore outsourcing is to reduce costs.”).

249. LIEBERMAN, *supra* note 24, at 15.

250. Armour, *supra* note 68, at 9B.

251. Phillip R. Seckman, Comment, *Invigorating Enforcement Mechanisms of the International Labor Organization in Pursuit of U.S. Labor Objectives*, 32 DENV. J. INT'L L. & POL'Y 675, 680 (2004).

1. Reforming Domestic Labor Law

For most U.S. laws, extraterritorial application of legal standards to cover situations abroad is rare. Moreover, courts favor legal interpretations limiting laws to domestic situations. In *EEOC v. Arabian American Oil Co.*, the U.S. Supreme Court emphasized “[i]t is a longstanding principle of American law ‘that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.’”²⁵² Similarly, focusing on labor law, the Court has pointed out that “[a]n intention so to regulate labor conditions which are the primary concern of a foreign country should not be attributed to Congress in the absence of a clearly expressed purpose.”²⁵³

Responding to the Supreme Court’s emphasis that legislation must express a clear intent for extraterritorial application, the Civil Rights Act of 1991 amended Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA) “to provide a clear statement of Congressional intent of extraterritorial application.”²⁵⁴ These changes extended legal protection to U.S. citizens working for a U.S. or U.S.-controlled employer overseas.²⁵⁵ In addition, the laws also apply to a “U.S.-based subsidiary company of a foreign multinational corporation at a location in the United States.”²⁵⁶ In most cases, these extraterritoriality changes will not be important for offshore outsourcing because these arrangements involve non-U.S. citizens employed overseas by non-U.S. companies. However, it may be possible for U.S.-based employees of a foreign company to assert claims of discrimination on the basis of national origin under Title VII.

For example, in *Goyette v. DCA Advertising Inc.*,²⁵⁷ the American subsidiary of Japan’s Dentsu advertising agency terminated twenty-two American employees and assigned their duties to employees of Japanese national origin.²⁵⁸ In determining whether the plaintiffs had established a prima facie case of discrimination, the district court noted that “[t]here is no dispute that the plaintiffs, as persons of American national origin,

252. 499 U.S. 244, 248 (1991) (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)).

253. *Filardo*, 336 U.S. at 286.

254. Melody M. Kubo, Comment, *Extraterritorial Application of the Americans with Disabilities Act*, 2 ASIAN-PAC. L. & POL’Y J. 259, 274 (2001).

255. *Id.* at 276.

256. *Id.* at 290.

257. *Goyette v. DCA Adver. Inc.*, 828 F. Supp. 227 (S.D.N.Y. 1993).

258. Brannon S. Burroughs, Note, *Not in This Country, You Don’t (Today): National Origin Discrimination in Goyette v. DCA Advertising, Inc.*, 19 N.C.J. INT’L L. & COM. REG. 371, 372–73 (1994).

benefit from the protection of Title VII.”²⁵⁹ Accordingly, based on *Goyette*, it is essential for plaintiffs who have been fired and replaced by offshore workers to point out discriminatory conduct that is prohibited under federal law. For instance, some types of discrimination are not protected, such as discrimination on the basis of citizenship and alienage.²⁶⁰ Under the current legal structure, national origin discrimination may be a viable argument for employees who have lost their jobs as a result of offshore outsourcing arrangements.

A typical situation tends to involve U.S. companies sending American employees overseas to train their replacements. For instance, “Kevin Flanagan, a computer programmer with Bank of America, was fired from his job after being forced to train his replacement, an Indian worker who was taking over Flanagan’s job as part of Bank of America’s effort to replace its American workforce with foreign labor.”²⁶¹ In a similar scenario, a lawyer representing a fired worker in Flanagan’s position may be able to cite the offshoring arrangement as “the application of a specific or particular employment practice that has created the disparate impact” on employees of U.S. national origin.²⁶² In that situation, the issue becomes “whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer.”²⁶³ In this inquiry, “even if the policy significantly serves the legitimate employment goals of the employer, a plaintiff may still prevail in a disparate impact case by showing that an alternative non-discriminatory policy would serve the employer’s legitimate interests with equal effectiveness.”²⁶⁴ Although there is no evidence that displaced workers have succeeded by using discrimination laws against their former employers, it may be possible that offshore outsourcing could be viewed as a form of national origin discrimination.

Although domestic labor laws touch on employment arrangements involving U.S. citizens and U.S. companies, the current system directed at regulating labor relations was not promulgated with outsourcing arrangements in mind. Areas of domestic law other than labor law could relate to the situation. For instance, “[s]ection 301 of the US Trade Act authorizes the US to take unilateral trade action against other countries that fail to respect labour standards, and the US Generalized System of Preferences conditions preferential access to the US market on the

259. *Goyette*, 828 F. Supp. at 232.

260. See *Espinoza v. Farah Mfg. Co.*, 414 U.S. 86, 95 (1973) (holding that “nothing in [Title VII] makes it illegal to discriminate on the basis of citizenship or alienage”).

261. Matt Hayes, *U.S. Tech Workers Bear Brunt of Immigration Policy*, FOXNEWS.COM, Apr. 29, 2004, at <http://www.foxnews.com/story/0,2933,118473,00.html>.

262. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989).

263. *Id.* at 659.

264. *Goyette*, 828 F. Supp. at 236 (citing *Ward’s Cove Packing*, 490 U.S. at 660–61).

acceptance of internationally recognized worker rights.”²⁶⁵

Even considering legal provisions allowing sanctions for labor rights violations, the U.S. legal structure remains deficient in addressing other issues implicated by offshore outsourcing. Thus, to ensure adequate protection of employee rights while allowing business freedom, labor law reform should take into account new methods of transborder data flow and characteristics of service sector employment. For example, some argue that “[t]he approach needs to recognize that raising standards overseas is vital to retaining stable and substantial jobs at home.”²⁶⁶ In addition, labor law reforms may also include reduced obstacles to union organizing, compensation for displaced U.S. workers, and sanctions targeted at companies that violate internationally recognized labor rights.²⁶⁷

One method to accomplish these goals is to amend various provisions in currently existing laws. Accordingly, lawmakers might consider modifying statutory definitions to include a category for offshore workers when they are performing service sector tasks. The new provisions could include more limited forms of protection by referring to selected provisions of U.S. law or modifying existing standards for offshore outsourcing. This type of differentiated system was created, to some extent, with regard to American Samoa. For instance, The Fair Labor Standards Act created “a special industry committee to recommend the minimum rate or rates of wages to be paid . . . to employees in American Samoa.”²⁶⁸ The role of the committee is to

recommend . . . the highest minimum wage rates for the industry which it determines, having due regard to economic and competitive conditions, will not substantially curtail employment in the industry, and will not give any industry in American Samoa a competitive advantage over any industry in the United States outside of American Samoa²⁶⁹

Following a similar method, Congress could amend the Fair Labor Standards Act to include a special committee organized for recommending minimum labor standards that could be applied to a defined class of offshore workers engaged in outsourcing projects involving U.S. data. By

265. Patrick Macklem, *Labour Law Beyond Borders*, 5 J. INT’L ECON. L. 605, 621 (2002).

266. SARAH ANDERSON & JOHN CAVANAGH, *OUTSOURCING: A POLICY AGENDA 3* (Foreign Pol’y in Focus, Policy Brief Vol. 9, No. 2, 2004), at <http://www.fpif.org/pdf/vol9/02outsources.pdf>.

267. *Id.*

268. 29 U.S.C. § 205(a) (2000).

269. 29 U.S.C. § 208(b) (2000).

authorizing the use of a committee, the law could be modified by the issuance of regulations relating to existing legal provisions for wages and working conditions.

Aside from creating a committee structure for suggesting regulations within statutorily defined parameters, another option is the creation of an entirely new section in Title 29 to cover offshore outsourcing as a distinct form of employment arrangement. For comparative purposes, it is helpful to refer to the Migrant and Seasonal Agricultural Worker Protection Act (MSPA).²⁷⁰ Although migrant labor contracting arrangements are factually different from offshore outsourcing contracting, these legal provisions are useful for illustrating a successful approach to balancing contractual freedoms with protective labor regulations. In the context of agricultural labor, Congress enacted special provisions to “protect migrant workers from unscrupulous contractors who take advantage of their superior bargaining position by exploiting the workers in various ways.”²⁷¹ This type of logic could apply equally in the offshore outsourcing context. For instance, an offshore outsourcing regulation could offer a similar rationale based on protecting those with less bargaining power, such as U.S. workers displaced by offshore outsourcing contracts and/or certain types of offshore laborers working in specified functional areas.

In addition to similarities in rationale, the structure of the MSPA exemplifies a feasible regulatory model relying on certification. For instance, in *Mountain Brook Orchards, Inc. v. Marshall*, Judge Higgenbotham wrote:

One of the Congressional tools designed to deter the worst abuses has been passage of statutes which require farm labor contractors to be certified by the Department of Labor and which prohibit any person from engaging the service of a farm labor contractor “unless he first determines that the farm labor contractor possesses a certificate from the Secretary that is in full force and effect at the time he contracts with the farm labor contractor.”²⁷²

Under the act, “a ‘farm labor contractor’ is defined as ‘any person who, for a fee, either for *himself* or on behalf of another person’ engages in various hiring activities.”²⁷³ Because registration is required to engage in any farm labor contracting activity, the registration review process allows the Secretary of Labor to conduct investigations and impose statutorily

270. 29 U.S.C. §§ 1801–1872 (2000).

271. *Guerrero v. Garza*, 418 F. Supp. 182, 185 (D. Wis. 1976).

272. 640 F.2d 454, 455 (3d Cir. 1981) (quoting 7 U.S.C. § 2043(c)).

273. *Marshall v. Green Goddess Avocado Corp.*, 615 F.2d 851, 854 (9th Cir. 1980) (quoting 7 U.S.C. § 2042(b) (emphasis added by court)).

defined requirements on applicants who wish to receive certification.²⁷⁴ Farm labor contractors who violate the Act or Department of Labor regulations may face civil and criminal sanctions. Moreover, violators may be placed on a debarment list of ineligible farm labor contractors.²⁷⁵

In conjunction with the certification approach, the Act imposes written disclosure requirements and other substantive protections for migrant and seasonal workers. "Courts have held that § 1822(c) liability can arise when a term of employment is required to be part of the working arrangement."²⁷⁶ For example, the defendant-employer in *Elizondo* was found to have violated a required term of employment set forth in federal regulations by failing to provide water for drinking and hand washing in the fields.²⁷⁷

Drafting and implementing new legal protections has proven very difficult. In the farm labor context, the law was remodeled three times before reaching its current structure. With each revision, Congress lamented that abuses continued unabated and the Act failed to achieve its objectives.²⁷⁸ However, after forty years, the MSPA has been touted as having the "teeth" that previous laws lacked.²⁷⁹ The MSPA has been successful due to its certification, disclosure, and enforcement provisions. By focusing on the MSPA's successful regulatory elements, new legislation aimed at offshore outsourcing may benefit by achieving Congressional objectives more quickly. In addition, although legal revisions may be necessary, overall effectiveness may be greatly enhanced by avoiding mistakes of the past.

2. Using Product Labeling to Capture Consumption Externalities of Offshore Outsourcing

In addition to formal legal reforms, market-based mechanisms may be a possible vein through which to induce companies to adhere to certain benchmarks for labor quality and responsible offshore outsourcing. "According to the market research journal *Lifestyles of Health and Sustainability* (LOHAS), 63 million American adults now base their purchasing decisions on how the products they consume affect the

274. 29 U.S.C. § 1812.

275. See, e.g., U.S. DEP'T OF LABOR, MIGRANT AND SEASONAL AGRICULTURAL WORKER PROTECTION ACT (MSPA) INELIGIBLE FARM LABOR CONTRACTORS (2005), available at http://www.dol.gov/esa/regs/statutes/whd/mspa_debar.htm (listing the names of individuals who may not engage in activity as a farm labor contractor).

276. *Elizondo v. Podgorniak*, 100 F. Supp. 2d 459, 463 (E.D. Mich. 2000).

277. *Id.*

278. Gary D. Brunsvik, Comment, *The Seven Deadly Sins of MSPA Joint Employer Liability: Strict Liability, the Department of Labor's Hidden Agenda!*, 9 SAN JOAQUIN AGRIC. L. REV. 117, 122 (1999).

279. *Id.*

world.”²⁸⁰ To capture the economic power behind these decisions, the crux of a market-based approach is to create a process whereby labor issues associated with offshore outsourcing can be translated into an economic commodity.²⁸¹ One way to accomplish this task is to include information with the good or service so that consumers who support higher labor standards can buy according to their preference.²⁸² This idea, known as social labeling, “has origins that can be traced back to the White Label in the U.S. as early as 1899,” declaring that clothing had been produced without women and child laborers.²⁸³ However, even with historical roots and success in other contexts, this approach has several inherent difficulties that must be addressed in order to have a successful program. First, a major issue is that individual preferences over working conditions or worker rights are not related to their actual consumption of products.²⁸⁴ For instance, the fact that offshore typing and information processing services are used to prepare a bank statement does not alter the appearance, quality, or utility of the statement that one receives in the mail. Therefore, to capture awareness, a type of symbol, label, or brief statement should be visible and convey the message that the corporation has adhered to high labor standards. After generating public recognition, there is still the matter of making sure that conditions promised by the social label have been truly met. If there is no mechanism in place to assure compliance, labels will fail to achieve the underlying objective of improving conditions because it would be very difficult for consumers to assess labor conditions independently.²⁸⁵ Thus, as previously noted with regard to privacy seals and certification authorities, market-based regulation depends on reputation, private third-party certification, or using non-governmental organizations (NGOs) or public agencies to make certain that companies are not cheating.²⁸⁶

One continuing success story is the fair trade movement and, in particular, Fair Trade coffee. The movement was fueled by the recognition that market rates for coffee were inadequate to support farm laborers living

280. TRANSFAIR USA, FAST FACTS: FAIR TRADE CERTIFIED COFFEE, at http://www.transfairusa.org/pdfs/fastfacts_coffee.pdf (last visited Apr. 19, 2005).

281. See Nirvikar Singh, *The Impact of International Labor Standards: A Survey of Economic Theory*, in INTERNATIONAL LABOR STANDARDS 107, 146 (Kaushik Basu et al. eds., 2003) (exploring the idea that “labor standards can be an economic commodity”).

282. See *id.* at 147 (positing that consumers concerned about labor standards “may be willing to pay more for higher labor standards”).

283. ARNAB K. BASU ET AL., GUARANTEED MANUFACTURED WITHOUT CHILD LABOR 1 (Dep’t of Agric., Res., and Managerial Econ., Cornell Univ., Working Paper No. 2000-04, 2000), at <http://www.wm.edu/economics/people/basu/papers/childlabor-sociallabeling.pdf>.

284. Singh, *supra* note 281, at 150.

285. *Id.* at 148–49.

286. *Id.*

in abject poverty, earning wages at less than twelve cents an hour.²⁸⁷ To address the problem at its roots, reformers began to buy directly from coffee farmers for a tripled per pound price and sell the product as fair trade coffee.²⁸⁸ Some companies, like Green Mountain, offer farmers a minimum of \$1.26 per pound “for some of its coffee even though the world price is around 60 [cents].”²⁸⁹ Other companies rely on TransFair USA to certify Fair Trade coffee producers based on a set of established criteria, including labor standards.²⁹⁰ The resulting increases in payments to coffee farmers were not merely donations to a worthy cause. Instead, the costs of promoting labor and environmental improvements were marketed as special attribute of the coffee through the use of slogans like “The Taste of a Better World,” artistic photographs of coffee farmers, and the use of certification organizations like TransFair USA.²⁹¹

In just a few years since the movement started, Fair Trade coffee sales have soared. Between 2002 and 2003, “Fairtrade labelled sales across the world grew by 42.3%.”²⁹² Consumer demand has expanded the availability of the coffee beyond the shelves of specialty stores and local coffee shops. For example, Sara Lee began offering the product “after institutional clients—hospitals and universities—demanded it.”²⁹³ Now ordinary retailers, from Shaw’s Supermarkets to Dunkin’ Donuts, sell Fair Trade coffee across the U.S.²⁹⁴ Even the coffee giant Starbucks has promoted the cause, purchasing 2.1 million pounds of Fair Trade certified coffee in 2003, “nearly doubling the amount purchased the previous year.”²⁹⁵

The fair trade concept is growing to include additional products like fruit, tea, and cocoa.²⁹⁶ Despite lagging availability in the United States, Fair Trade Certified bananas “have gained as much as 50 percent market share [in Switzerland] with a growth rate of over 50 percent per year.”²⁹⁷

287. Lisa McLaughlin, *Coffee with Cream—And a Conscience*, TIME, Feb. 17, 2003, at 97.

288. Tamara Straus, *Fair Trade Coffee: An Overview of the Issue*, ALTERNET, Nov. 30, 2000, at <http://www.organicconsumers.org/starbucks/coffback.htm>.

289. Margot Roosevelt, *The Coffee Clash*, TIME, Mar. 8, 2004, available at <http://www.time.com/time/insidebiz/article/0,9171,1101040308-596156-1,00.html>.

290. See TRANSFAIR USA, FAIR TRADE CERTIFICATION (2004), at <http://www.transfairusa.org/pdfs/certification.overview.pdf> (providing information about fair trade certification criteria) [hereinafter FAIR TRADE CERTIFICATION].

291. Roosevelt, *supra* note 289.

292. FAIRTRADE LABELLING ORGANIZATIONS INT’L, FACTS AND FIGURES, at <http://www.fairtrade.net/sites/impact/facts.html> (last visited Mar. 29, 2005).

293. Roosevelt, *supra* note 289.

294. *Id.*

295. STARBUCKS COFFEE, FAIR TRADE IN OUR STORES, at <http://www.starbucks.com/aboutus/fairtradeinstores.asp> (last visited Apr. 20, 2005).

296. FAIR TRADE CERTIFICATION, *supra* note 290.

297. TRANSFAIRUSA, BACKGROUNDER: FAIR TRADE CERTIFIED BANANAS, at http://www.transfairusa.org/pdfs/backgrounder_banana.pdf (last visited Apr. 20, 2005).

Given the success of Fair Trade Certified coffee, the U.S. market may evolve to generate significant demand for these additional products.

The significance of fair trade labeling for those looking at offshore outsourcing matters is that similar logic may be applied to addressing labor concerns in this context. The challenge is the same: capturing an externality—high labor standards—so that consumption of the service or product has a relationship to that externality. In most cases, the services are fungible. The actual service of banks offering personal checking accounts, for instance, will not vary much between banking institutions. Thus, generating public attention to the externality of avoiding cost-cutting domestic layoffs must rely on the use of slogans, photos, and even certification. In addition to directing attention to previously overlooked issues, service industries could realize increased profits as people choose one service over another because they are motivated by a comfort resulting from having done something good.

This process, however, is far from infallible and would not resolve the full range of issues stemming from offshore outsourcing. One problem is that the strategy depends on those who are willing and able to pay.²⁹⁸ Thus, there is no guarantee that people will opt for a service bearing the costs of labor externalities over ones that do not make such a connection. Moreover, even if such a demand exists, problems arise with information availability and assuring true guarantees of compliance.²⁹⁹

3. Unionization

Under the National Labor Relations Act (NLRA),³⁰⁰ there are two main avenues for forming a union: (1) Board-certified election and (2) voluntary recognition.³⁰¹ The first method involves filing a petition supported by at least thirty percent of the workers, holding a Board-conducted election, and obtaining Board certification or, in cases where employers refuse to honor Board certifications, enforceable bargaining orders.³⁰² While often effective in allowing unionization, this method is problematic for several reasons: (1) it could take years to complete the process, (2) evidence shows that in one-fourth of union organizing

298. See Singh, *supra* note 281, at 149 (“The issue of differential willingness and ability to pay also has a bearing on the approach to implementing labor standards.”).

299. See generally *id.* at 148–49 (discussing the problem of cheating with respect to labeling and certification).

300. 29 U.S.C. §§ 151–169 (2000).

301. *National Labor Relations Board Issues: Hearing Before the Senate Subcomm. on Dep’ts of Labor, Health and Human Servs., and Educ., and Related Agencies of the Comm. on Appropriations*, 108th Cong. 56–57 (2004) (prepared statement of Nancy Schiffer, Associate General Counsel, AFL-CIO).

302. *Id.* at 56.

campaigns at least one employee is fired because of involvement, and (3) workers may feel constrained in freely exercising their vote due to employer's illegal threats.³⁰³ By using the second method, voluntary recognition, employees "designate their majority support by signing cards authorizing the union to represent them and the employer may voluntarily recognize unions based on this demonstration of majority support."³⁰⁴ A potential difficulty with this approach is that employers may argue that majority support is not genuine and proceed to engage in tactics "designed to dilute the majority support that had been obtained by the organizing unions."³⁰⁵

Although labor unions are typically associated with manufacturing and industrial jobs, fears of falling salaries and job insecurity have prompted some workers in service sector professions to join unions.³⁰⁶ In fact, "the overall unionization rate for white-collar professionals now exceeds the rate for non-professional workers."³⁰⁷ Even highly paid, white-collar workers like "[e]ngineers at Lockheed-Martin and Boeing, researchers with advanced degrees at the University of California, and professional airline pilots" have recently joined trade unions.³⁰⁸

Some explain that increased union membership could be a means for protecting service sector jobs most susceptible to offshore outsourcing: "[u]nlike their nonunion counterparts, workers covered by a labor agreement receive a fair measure of job security. This job security is assured through a combination of contract clauses: the arbitration clause, the just cause clause, the seniority clause, and layoff and recall rights based upon seniority."³⁰⁹ The World Bank has also documented numerous additional benefits, including reduced wage differences between men and women and skilled and unskilled workers.³¹⁰ Accordingly, "a massive

303. *Id.*

304. *Id.* at 57.

305. Charles B. Craver, *The National Labor Relations Act Must Be Revised to Preserve Industrial Democracy*, 34 ARIZ. L. REV. 397, 403 (1992).

306. Lisa Vaas, *IT Workers on Way to Joining Unions?*, EWEK (Aug. 5, 2002), at <http://www.eweek.com/article2/0,1759,431814,00.asp>.

307. Charles B. Craver, *Why Labor Unions Must [and Can] Survive*, 1 U. PA. J. LAB. & EMP. L. 15, 45 (1998) (citing Sar Levitan & Frank Gallo, *Collective Bargaining and Private Sector Professionals*, 112 MONTHLY LAB. REV. 24 (1989)).

308. WASH. ALLIANCE OF TECH. WORKERS, COMM. WORKERS OF AM., ABOUT WASHTECH—UNIONS: MYTHS AND REALITIES, at <http://www.washtech.org/about/mythsandrealities.php> (last visited Apr. 20, 2005).

309. See Steven H. Kropp, *The Safety Valve Status of Consumer Bankruptcy Law: The Decline of Unions as a Partial Explanation For the Dramatic Increase in Consumer Bankruptcies*, 7 VA. J. SOC. POL'Y & L. 1, 11 (1999) (citing Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of Just Cause in Employee Discipline Cases*, 1985 DUKE L.J. 594 (1985)).

310. OFFICE OF INT'L INFO. PROGRAMS, U.S. DEP'T OF STATE, WORLD BANK SAYS UNIONS BOOST WAGES IN RICH, POOR NATIONS (Feb. 13, 2003), at <http://www.usembassy.it/>

unionization of information workers would put them in a position to collectively bargain with companies about hours, wage increases and benefits.”³¹¹

Despite the purported benefits, technology and service sector workers in the United States are “grossly underserved by organized labor.”³¹² A primary explanation may be that “[t]echnological issues often prove insufficiently concrete to provide a basis for organizing.”³¹³ Moreover, some service sector jobs tend to attract “people who strive for individual recognition and achievement—and they often shun unions.”³¹⁴ Finally, another rationale is that the NLRA includes provisions that impair certain service sector organizing.³¹⁵ For instance, the Act excludes supervisors and managers, meaning that service employees who happen to supervise or manage others in bureaucratically organized workplaces would be excluded from the Act’s coverage.³¹⁶

The difficulty of establishing strong union footholds in some service sector industries is partially related to corporate resistance. For instance, when customer service employees at Amazon.com discovered that the company decided to outsource some of its internal operations to the New Delhi, India-based Daksh.com corporation, they collaborated with the Communication Workers of America’s WashTech project to open up a unionization drive.³¹⁷ However, “Amazon’s director of employee relations [had already] set up an internal web site to help company supervisors recognize and defeat an organizing drive, and to turn workers against unions”³¹⁸

Similarly, companies in India have expressed fears that unionization efforts could hamper competitiveness in their low-cost call center and BPO operations. These fears prompted HCL Technologies-BPO Services, an Indian company specializing in call centers, to maintain three different centers in Delhi with 600 people each “to avoid the formation of unions

file2003_02/alia/a3021317.htm.

311. Joel Keller, *Want To Stop Your Job From Being Outsourced? Join a Union*, SALON.COM, Nov. 6, 2003, at <http://www.salon.com/tech/feature/2003/11/06/unionize/index/html>.

312. *Id.*

313. Cynthia B. Costello, *Technological Change and Unionization in the Service Sector*, 110 MONTHLY LAB. REV. 45, 46 (1987).

314. Elias Wolfberg, *New Recruits: ‘White-Collar’ Workers Reach Out to Receptive Unions*, NEWSDAY (N.Y.), Sept. 2, 2001, at F06.

315. Marion Crain, *The Transformation of the Professional Workforce*, 79 CHI.-KENT. L. REV. 543, 546 (2004).

316. *Id.*

317. Charlie Cray, *Amazon.union?*, MULTINAT’L MONITOR, Jan./Feb. 2001, at 4, available at <http://multinationalmonitor.org/mm2001/01jan-feb/lines.html>.

318. *Id.*

which are an increased possibility among large numbers.”³¹⁹

Evidence suggests that these are not isolated instances by a few worried companies. In studying these retaliatory tactics, one researcher found that “92 percent of private-sector employers, when faced with employees who want to join together in a union, force employees to attend closed-door meetings to hear anti-union propaganda.”³²⁰ Moreover, “[e]ven after workers successfully form a union, in one-third of the instances, employers never negotiate a contract.”³²¹

Although many unionization efforts, like the one at Amazon.com, fail to materialize, unions still have confidence they can become part of the employment structure at many service sector companies.³²² Recently, Computer Sciences Corporation, Applied Mechanical, and L-3 Communications all successfully brokered deals with labor unions.³²³ In addition, a 2001 National Labor Relations Board (NLRB) decision in the case of *Gallup, Inc.*³²⁴ may facilitate organization efforts through the use of email. In *Gallup*, the Board held that implementation of a no-solicitation policy including a ban of e-mail use for non-business reasons was impermissible because it was implemented as a result of the union organizing campaign.³²⁵ These instances of successful union negotiations with high-tech companies and the potential for future organizing campaigns show that unionization is one method by which worker rights and corporate goals may be balanced when offshore outsourcing decisions impact domestic employment.³²⁶

The trend toward union affiliation could continue given that union labels offer software and other high-tech companies an avenue to reach new business. For instance, using its union label as an inside track for securing work with other unions, Blacksheep Technology “recently landed

319. *Unionization Worries BPO sector*, CYBER INDIA ONLINE, June 13, 2003, at <http://www.ciol.com/content/news/Nasscom/2003/103061305.asp>.

320. John T. Fakler, *Software Firms & Labor Unions: Unholy Alliance, or a Healthy Antidote to Outsourcing?*, at <http://www.isyourjobisgoingoffshore.com/forums/showthread.php?t=3060> (Oct. 16, 2004).

321. *Id.*

322. See, e.g., Margret Johnston, *Unions Work to Entice High-Tech Workers*, INFOWORLD, Feb. 6, 2001, at <http://www.infoworld.com/articles/hn/xml/01/02/06/010206/hnunions.html> (describing tech workers' continued interest in unionization despite obstacles such the lay off of Amazon customer service workers before their efforts to unionize were consummated).

323. Fakler, *supra* note 320.

324. 334 N.L.R.B. 366 (2001).

325. *Id.* at 366.

326. See, e.g., DAN CLAWSON, *THE NEXT UPSURGE: LABOR AND THE NEW SOCIAL MOVEMENTS* 15 (2003) (“Despite unions’ decline, they remain perhaps the most powerful and diverse progressive force in the United States today.”); CHARLES B. CRAVER, *CAN UNIONS SURVIVE?* 94 (1993) (“Despite the recalcitrance of labor and management officials, it is likely that increased labor-management cooperation will occur.”).

a job with a labor union in Indianapolis that asked Blacksheep for help with computer systems design and installation.”³²⁷

Even without company support, new unions are targeting service sector workers using a range of specialized recruitment methods. Many modern, high-tech trade unions have emerged with the help of traditional, well-established unions. For instance, the Communications Workers of America (CWA), a traditional union with membership exceeding 700,000, assisted the formation of Alliance@IBM and Washington Alliance of Technology Workers (WashTech) as unions geared toward attracting high-tech workers.³²⁸ WashTech claims to be “A Voice for the Digital Workforce” and markets itself by pointing out that “[a]n organized group harnesses the power of collective action to let you speak together, with one voice.”³²⁹

Advocating their positions, participants in the service sector labor movement have turned to “high-tech recruitment tools on the internet that target select corporate players inside vulnerable industries such as technology.”³³⁰ “Some IT workers say Internet chat rooms act as highly efficient ‘union halls,’ allowing them to band together to share job information and boycott or even sue employers who they believe misbehave.”³³¹ But even with new tactics, the underlying organizational approach should focus on reaching out to individuals. By listening to “each employee’s concerns, organizers are able to show respect for each person’s viewpoint and to formulate collective objectives that reflect the actual desires of bargaining-unit personnel.”³³²

With each approach, the bottom-line is that bolstering union influence and power requires enhanced coordination and increased membership numbers. Even larger unions agree that “[t]he most vexing issue is whether reorganization is required to harness strength and recruit members.”³³³ In 2003, “five union leaders—including Andrew L. Stern, president of the powerful Service Employees International Union—created a group called New Unity Partnership to promote a plan to consolidate the unions into a

327. Fakler, *supra* note 320.

328. See COMM. WORKERS OF AMERICA, at <http://www.cwa-union.org> (last visited Apr. 20, 2005) (listing Alliance@IBM and WashTech as two of CWA’s organizing efforts); see also TECHSUNITE.ORG—IT NEWS AND IT WORKER RESOURCES, at <http://www.techsunite.org> (last visited Apr. 20, 2005) (“[T]he nationally-oriented web site of WashTech/CWA”).

329. WASH. ALLIANCE OF TECH. WORKERS (WASHTECH), WHY ORGANIZE?, at <http://www.washtech.org/organize/> (last visited Mar. 9, 2005).

330. Fakler, *supra* note 320.

331. Wolfberg, *supra* note 314.

332. Craver, *supra* note 307, at 38.

333. Jeanne Cummings & Kelly Rayburn, *Labor Gets to Work on Revamp: AFL-CIO Considers Profound Changes After Election Losses*, WALL ST. J., Nov. 10, 2004, at A4.

dozen or so mega-organizations.”³³⁴ Although this particular consolidation plan has yet to gain acceptance among all unions, the idea has great potential to revitalize the significance and influence of organized labor.³³⁵ Irregardless of the success or failure of the New Unity Partnership, the future efficacy of organized labor may depend on union leaders’ willingness to explore new strategies and methods that may be implemented on a broad basis.

a. Devising New Strategies for Unions

i. Individual Standardized Contracts

The primary flaw of relying on unionization as a tool for balancing domestic employment issues with corporate decision-making is that unions depend on membership numbers to wield power. So far, the numbers are fairly weak. WashTech, for example, had less than 400 members in January 2004.³³⁶ Accordingly, unions may need to revise their strategies to organize workers in a manner that achieves common goals while providing individual flexibility and less commitment than traditional membership arrangements.

The virtues of this approach may be seen by assessing the success of motion picture and television unions that have maintained both high union density and strong growth rates over the last twenty years.³³⁷ These unions feature two significant differences from the typical structure: (a) the unions focus on “professional identification rather than worksite or employer-identification,” and (b) “[r]ather than ‘leveling down’ individual high-achievers, the old media unions negotiate minimum terms agreements that leave stars free to negotiate better deals”³³⁸

Similar to the motion picture and television union approach, a potential strategy for traditional unions is to augment the current unionization effort by developing standard contracts for use by individual employees. Despite only limited use in the labor context, uniformity or standardization of legal instruments has proven successful in varied contexts including commercial arbitration, commercial transactions,

334. *Id.*

335. *See id.* (“The United Brotherhood of Carpenters and Joiners of America did quit the AFL-CIO because it considered that leaders weren’t implementing changes fast enough. They became founding members of the New Unity Partnership, and rejoined the AFL-CIO.”).

336. Silja J. A. Talvi, *Tech Workers Combat Offshoring*, IN THESE TIMES, Jan. 26, 2004, available at <http://www.inthesetimes.com/site/main/article/687>.

337. Crain, *supra* note 315, at 603.

338. *Id.* at 603–04.

residential leasing, and banking.³³⁹ Moreover, there are numerous domestic and international organizations dedicated to promulgating new uniform laws, contracts, and standards.³⁴⁰ By using model agreements or standard contracts, employees may be able to secure certain minimum protections and employment conditions. Labor unions would play an important role as the organizing bodies for determining labor standards for inclusion, developing proper contractual forms, and assisting individuals and companies when implementing the agreements. For such an approach to be successful, however, unions may need to explore innovative approaches like posting the documents on the Internet, forging alliances with non-union groups, and promoting the use of contracts without having any ties to the union itself. One possibility is to form alliances with professional organizations like the Institute of Electrical and Electronics Engineers and the American Ceramic Society.

A comparison may be drawn to the success of The American Institute of Architects (AIA) in drafting “over 80 forms and contracts that define relationships and terms involved in design and construction projects.”³⁴¹ “The AIA’s drafting process is a thorough and deliberate approach that strives to achieve a fair balance among interests affected by the contract documents.”³⁴² In creating this balance, the organization selects a Documents Committee of practicing architects and “solicits feedback from owners, general contractors, engineers, subcontractors, sureties, lawyers, insurers, and others.”³⁴³ In addition to fairness and balance in drafting, the AIA has developed a “Revision Policy to ensure that AIA Contract Documents maintain consistently high standards while still adapting to current trends and practices.”³⁴⁴ As a consequence of the AIA’s comprehensive approach, high standards, and expertise, the organization proudly notes that its standard documents “are now widely recognized as the industry standard.”³⁴⁵

339. See generally, UNIFORM LAW COMMISSIONERS, ABOUT NCCUSL, at <http://www.nccusl.org/Update/DesktopDefault.aspx?tabindex=0&tabid=9> (Dec. 2, 2003) (providing information about the National Conference of Commissioners on Uniform State Laws, which “provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law”).

340. See, e.g., INT’L INST. FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), PRESENTATION, at <http://www.unidroit.org/english/presentation/main.htm> (last visited Apr. 20, 2005) (“UNIDROIT’s basic statutory objective is to prepare modern and where appropriate harmonised uniform rules of private law understood in a broad sense.”).

341. THE AMERICAN INSTITUTE OF ARCHITECTS, ABOUT AIA CONTRACT DOCUMENTS, at http://www.aia.org/docs_about [hereinafter AIA CONTRACTS] (last visited Apr. 20, 2005).

342. THE AMERICAN INSTITUTE OF ARCHITECTS, HISTORY OF CONTRACT DOCUMENTS, at http://www.aia.org/docs_history [hereinafter AIA HISTORY] (last visited Apr. 20, 2005).

343. *Id.*

344. AIA CONTRACTS, *supra* note 341.

345. *Id.*

By following well-organized drafting, revision, and development methods, it may be possible for professional organizations, unions, or alliances between certain groups to emulate the success of the AIA when composing standard contracts. As with the current situation for service sector employment, there has never been a legal mandate that construction projects involve standard contracts or documents. Moreover, like employment situations, no construction projects will be the same in terms of style, duration, or cost. Yet the AIA's work in developing standard contracts has been willingly accepted due to the quality and expertise in the actual documents as well as their ongoing revision efforts to ensure the framework remains up-to-date. In addition, entities engaged in construction projects realize significant cost savings by delegating contracting responsibilities to the group.

Even though service sector employment is a broader subject than construction contracts, organizations could devote resources to developing a standard contract drafting and revision process that could be promoted as a cost-saving means for employers seeking high-quality, up-to-date contracts. Acceptance of these uniform contracts by employers may also attract better-qualified employees, indicate adherence to certain labor standards, and allow greater efficiency in resolving labor disputes. In theory, employers could view the uniform contract as a high quality document that saves both time and legal expenses by striking a fair balance.

This form of self-regulation has already proven successful in some labor movements. In 1928, various groups—including the YWCA, the Women's Bureau of the Department of Labor, the Federal Board of Vocational Education, and the Bureau of Home Economics—convened a National Conference on Employer-Employee Relations in the Home to devise strategies for improving labor conditions.³⁴⁶ After developing shared goals, "Conference participants committed themselves to formulating 'working contracts by groups of employers and employees which [would] include minimum standards [and] individual contracts between employers and employees which [would] not undercut these standards . . .'"³⁴⁷ In the years following a second Conference in 1931, "reform organizations disseminated model contracts incorporating these standards to household employers across the country."³⁴⁸

In recent years, some have experimented with similar approaches, including one branch of the National Writers Union that worked to

346. Peggie R. Smith, *Regulating Paid Household Work: Class, Gender, Race, and Agendas of Reform*, 48 AM. U. L. REV. 851, 883–84 (1999).

347. *Id.* at 884 (alterations in original) (quoting Catherine B. Allen, *Legislation for Household Workers*, in FAIR AND CLEAR IN THE HOME 49 (Carol Biba & Dorothy P. Wells eds., 1936)).

348. *Id.* at 885.

establish an industry standard contract for the 7,000 freelance technical writers and reporters in its local constituency.³⁴⁹ Assuming companies agreed to a standard freelance contract, “one that guarantees minimum pay and preserves a writer’s intellectual property, the NWU would in essence be behaving like a legally sanctioned union.”³⁵⁰

ii. Global Framework Agreements

In recent years, unions have focused on developing global framework agreements (GFAs) for companies to adopt as binding company policy. Most agreements focus on key issues and carry titles such as a “declaration on ‘Social Rights and Industrial Relations’” or “Employees Fundamental Rights Declaration.”³⁵¹ According to the International Metalworkers Federation, typical agreements will include the International Labor Organization’s (ILO) Core Labour Standards as well as provisions addressing wages and working conditions.³⁵² The ILO Core Labour Principles are eight ILO Conventions identified “as being fundamental to the rights of human beings at work, irrespective of levels of development of individual member States.”³⁵³ These Conventions fall under the categories of freedom of association, abolition of forced labor, equality, and elimination of child labor.³⁵⁴ Furthermore, GFAs usually contain “an agreement that suppliers must be persuaded to comply.”³⁵⁵

GFAs differ from Codes of Conduct and other mechanisms unilaterally adopted by companies because, with the latter type of policy, labor is less involved and monitoring, if any, is controlled by the company itself.³⁵⁶ Thus, a GFA may be more effective due to union oversight and involvement in structuring the arrangement. GFAs also make sense

349. Wolfberg, *supra* note 314.

350. *Id.*

351. See, e.g., INT’L METALWORKERS’ FED’N, FRAMEWORK AGREEMENT AT PRYM, Aug. 13, 2004, at <http://www.imfmetal.org/main/index.cfm?n=47&l=2&c=9417> (Aug. 13, 2004) (discussing the declaration on “Social Rights and Industrial Relations” signed between the German-based company Prym and the International Metalworkers’ Federation); see also INT’L METALWORKERS FED’N, THE POWER OF FRAMEWORK AGREEMENTS, at <http://www.imfmetal.org/main/index.cfm?n=47&l=2&c=7786> (Jan. 7, 2003) (discussing how global unions “lay down the rules of conduct for transnational companies”).

352. INT’L METALWORKERS FED’N, A GLOBAL INSTRUMENT, at <http://www.imfmetal.org/main/index.cfm?n=47&l=2&c=7787> [hereinafter GLOBAL INSTRUMENT] (Jan. 7, 2003).

353. INT’L METALWORKERS FED’N, THE ILO CORE LABOUR STANDARDS, at <http://www.imfmetal.org/main/index.cfm?n=47&l=2&c=7799> (Jan. 10, 2003).

354. *Id.*

355. GLOBAL INSTRUMENT, *supra* note 352.

356. See INT’L METALWORKERS FED’N, CODES OF CONDUCT VERSUS INTERNATIONAL FRAMEWORK AGREEMENTS, at <http://www.imfmetal.org/main/index.cfm?n=47&l=2&c=7798> (Jan. 10, 2003) (comparing Codes of Conduct with International Framework Agreements).

considering that transnational business operations potentially touch on numerous countries, laws, and legal systems. Some countries may lack adequate labor laws. However, by using a GFA, the ILO's Core Labour Standards and other important labor protections "can be guaranteed in all facilities of a transnational company."³⁵⁷ So far, more than twenty GFAs have been concluded between trade unions and companies in sectors such as mining, chemicals, food, forestry, services, and automobiles.³⁵⁸

Because GFAs have been relatively successful at promoting social goals while allowing for open and fair world trade, unions and professional organizations could use these instruments to address concerns posed by offshore outsourcing.³⁵⁹ While not specifically mentioning offshore outsourcing, some GFAs already purport to deal with related issues. For example, among the promises included in its GFA, DaimlerChrysler pledges "to seek a fair balance between the commercial interests of the company and the interests of the employees."³⁶⁰ The fact that large multinational corporations have already accepted terms for maintaining jobs and recognizing certain employee rights demonstrates that GFAs could be a mutually beneficial reform strategy. Moreover, companies with existing GFAs could be presented with amendments to the agreement relating to offshore outsourcing.

iii. Lessons From the Japanese Employment Model

There is a common perception that Japanese corporations implement iron-clad guarantees of lifetime employment for workers. Although this type of job security is somewhat exaggerated, the underlying idea relates to the fact that the Japanese employment structure has allowed many employees to retain jobs for their entire careers. Professors Taira and Levine explain that the notion of strong domestic job security is not completely accurate, especially outside defined groups of "regular employees" slated for retention until they retire.³⁶¹ Even though guaranteed lifetime employment may be a far stretch from actual practice, "[t]he Japanese firm's ability to adjust quantity, quality, and organization of labor

357. GLOBAL INSTRUMENT, *supra* note 352.

358. See John Evans, *Globalising Workers' Rights*, OECD OBSERVER, Jan. 2003, available at <http://www.oecdobserver.org/news/fullstory.php/ard/847/Globalising-workers%92-rights.html>.

359. See, e.g., GLOBAL INSTRUMENT, *supra* note 352 ("For trade unions, IFAs are a way to promote workers' rights in the global arena.").

360. SOCIAL RESPONSIBILITY PRINCIPLES OF DAIMLERCHRYSLER 2, available at <http://www.imfmetal.org/main/files/DC%20code%20in%20English.pdf> (Sept. 2002).

361. Koji Taira & Solomon B. Levine, *Assessing Ongoing Reforms: Employment Flexibility and Joblessness in Low-Growth, Restructured Japan*, 544 ANNALS AM. ACAD. POL. & SOC. SCI. 140, 146 (1996).

inputs to changing needs of the product market” should be noted as an important employer response to economic change.³⁶² Various strategies adopted by Japanese corporations include cutting total hours, lowering compensation per hour, decreasing overtime, voluntary retirements, or loaning workers to other firms.³⁶³ The underlying philosophy of these corporate strategies is to mitigate the effects of economic downturn, the need for cost-savings, and global competition by looking at how corporate practices can be altered to achieve maximum employment while achieving business goals.

Several Japanese cases provide clear examples of this basic approach. For instance, in *Tokyo Oxygen Gas Co. v. Shimazaki*, a 1979 Tokyo High Court case, the court pointed out that it was permissible for Tokyo Gas to shut down an unprofitable business division if it was doing so due to an “unavoidable business necessity.”³⁶⁴ An unavoidable business necessity was seen as existing only when calls for voluntary retirement were exhausted and there would be no way to transfer employees to identical or similar jobs in other business locations not far from the original place of business.³⁶⁵ The language in this opinion places heavy emphasis on whether layoffs were unavoidable or just an easy means for cost-savings. This method of analysis gives employees a higher status than that of an expendable commodity because efforts to protect the worker must be explored by the corporation.

Similarly, *Aiko v. Nissan Motor Co.*, a 1987 Tokyo High Court case, involved Nissan’s business decision to change the production structure to build front-wheel-drive automobiles.³⁶⁶ As part of the restructuring effort, new manufacturing processes required that some employees relocate and retrain.³⁶⁷ However, several transferred workers claimed that the transfers violated their employment contracts and constituted an abuse of the corporation’s right to transfer.³⁶⁸ In assessing the case, the court pointed out that the employment agreement did not limit the employees’ work to acting only as machinists.³⁶⁹ Instead, the opinion notes that economic development and industrial restructuring requires transfer to new kinds of work and that the “transfers were unavoidable measures aimed at the

362. *Id.*

363. *Id.* at 148.

364. 30 R•minsh• 1002 (Tokyo High Ct., Oct. 29, 1979) (Kazuo Sugeno trans.), reprinted in JAPANESE LAW IN CONTEXT: READINGS IN SOCIETY, THE ECONOMY, AND POLITICS 385, 387 (Curtis J. Millhaupt et. al. eds, 2001).

365. *Id.*

366. 38 R•minsh• 681 (Tokyo High Ct., Dec. 24, 1987) (Kazuo Sugeno trans.), reprinted in JAPANESE LAW IN CONTEXT, *supra* note 363, at 395, 396.

367. *Id.*

368. *Id.* at 397.

369. *Id.*

efficient placement of the labor force and the smooth operation of the company.”³⁷⁰

The opinion reflects a balance between management necessity, operational needs, and employee rights. By allowing corporations to make necessary business decisions after addressing the effects on employees, the court creates mutual obligations. Employee obligations are implied in the court’s assessment of whether the workers had been “disadvantaged to an extent greater than they would normally *be expected* to endure as employees.”³⁷¹ Thus, there is a baseline expectation of what an employee should endure. Based on the opinion, a corporation should not conduct layoffs, transfers, or engage in measures detrimental to employee welfare unless viable alternatives do not exist.³⁷²

The unique Japanese approach to balancing employee rights with corporate decisions has been cited by economists as a reason for Japanese economic problems because the structure fails to allow “fluid new labor markets, where changing jobs mid-career can be commonplace.”³⁷³ Despite criticism, proponents of the Japanese approach describe numerous benefits including increased flexibility, better-trained workers, and greater capacity for innovation.³⁷⁴ For instance, economic commentator Eamonn Fingleton notes that “Japanese employers spend much more on training than their U.S. counterparts, for the very good reason that training pays a better return in Japan than in the U.S.”³⁷⁵ He also points out that in addition to minimizing human costs of recession, the inhibition against cutting workers in periods of economic decline may help enhance the competitiveness of Japanese businesses.³⁷⁶ The rationale is that employers with excess workers seek new ways to address the surplus, such as finding new markets which provide an outlet for increased production, deploying extra labor in improving the quality of each unit of output, and allocating labor to new product development.³⁷⁷

Although full legislative implementation of the Japanese-style labor system is an unlikely prospect for the United States, various attributes may prove valuable for addressing particular issues associated with offshore

370. *Id.* at 398.

371. *Id.* (emphasis added).

372. *See id.* (stating that “there must be a business or operational necessity for the transfer order”).

373. Howard W. French, *In Unemployment Itself, a Hint of Hope for Japan*, N.Y. TIMES, Sept. 9, 2001, § 4, at 4.

374. Eamonn Fingleton, *Japan Not Suffering Jobless Crisis—Unemployment Rate Small by Western Standards*, NIKKEI WKLY. (Japan), Mar. 4, 1996, at 7; *see also* Eamonn Fingleton, *Jobs for Life: Why Japan Won’t Give Them Up*, FORTUNE, Mar. 20, 1995, at 119, 120–22 (discussing reasons why Japan’s lifetime employment scheme persists).

375. Fingleton, *Jobless Crisis*, *supra* note 374.

376. *Id.*

377. *Id.*

outsourcing. As Japanese case law and employment practices show, workers are treated as more than mere commodities that may be reduced in response to corporate cost-saving needs. This same concept could be used by labor unions as a baseline for creating a multi-step process whereby the corporation would first try internal mitigation efforts, such as reallocating workers, to reduce costs before resorting to offshore outsourcing. By focusing on retention of workers as a priority, companies could realize cost savings while benefiting from using employees to improve internal quality and innovation.

IV. INTERNATIONAL LAW, TREATIES, AND THE WTO

Beginning with the 1947 negotiating rounds aimed at reducing tariffs and other barriers to trade, twenty-three of the world's major trading nations entered into the General Agreement on Tariffs and Trade (GATT) to provide freer international trade in goods.³⁷⁸ Over time, more nations joined GATT and multiple rounds of negotiations resulted in additional special agreements on subsidies, antidumping, and customs valuation.³⁷⁹ Today, the multilateral trading system is administered by the World Trade Organization (WTO).³⁸⁰ In addition to providing for the establishment of the WTO, the WTO Agreements cover trade in goods, trade in services, and trade-related aspects of intellectual property rights.³⁸¹

Although offshore outsourcing of service tasks could implicate all three major agreements, the General Agreement on Trade in Services (GATS)³⁸² is likely most relevant. GATS offers various protections for international trade in services defined as constituting four modes of supply: cross-border supply, commercial presence through branches and subsidiaries, consumption abroad, and presence of natural persons.³⁸³ Cross-border supply involves situations where only the service crosses national borders, such as delivery of service via telecommunications.³⁸⁴ The other three categories extend GATS protections to businesses that set up operations inside a WTO member-state and send individuals temporarily

378. See, e.g., CASES AND MATERIALS ON THE REGULATION OF INTERNATIONAL BUSINESS AND ECONOMIC RELATIONS 467–68 (Alan C. Swan & John F. Murphy, 2d ed. 1999) [hereinafter INTERNATIONAL CASEBOOK] (providing an overview of the World Trade Organization agreements).

379. *Id.* at 469.

380. *Id.* at 473.

381. *Id.*

382. Jan. 1, 1995, 1869 U.N.T.S. 183, 33 I.L.M. 1177 [hereinafter GATS].

383. ECON. RESEARCH AND STATISTICS DIV., WTO, MEASURING TRADE IN SERVICES 10 (2003), at http://www.wto.org/english/res_e/statis_e/services_training_module_e.pdf.

384. *Id.*

into the territory to provide a service.³⁸⁵

Although the international trading regime is not directed to addressing the rights of foreign investors on an individual basis, the WTO framework is significant for creating a level playing field for trade.³⁸⁶ For instance, the WTO Agreements retain two key principles from the original 1947 GATT agreement—national treatment and most favored nation (MFN) treatment.³⁸⁷ These concepts are particularly important for offshore outsourcing arrangements because each ensures a baseline level of fairness. MFN treatment means that WTO member-states will not discriminate between their trading partners in administering tariffs and other regulations.³⁸⁸ Therefore, “every time a country lowers a trade barrier or opens up a market, it has to do so for the same goods or services from all its trading partners”³⁸⁹ Similarly, national treatment ensures that imported and locally-produced goods and services are treated equally after entering the domestic market.³⁹⁰

Because offshore outsourcing involves continuous transborder information flows, international business agreements, and foreign workers, the principles currently included in the WTO system must be considered when lawmakers propose new domestic policies. Accordingly, domestic reform efforts should avoid violating obligations set forth in the WTO agreements. This will involve adhering to basic MFN and national treatment principles, as well as to other binding commitments negotiated in the WTO context.

The consequences of ignoring WTO obligations could include challenges by other WTO member governments. In this process, a challenger would first request formal consultations.³⁹¹ If the consultations fail, a WTO dispute settlement panel is convened to resolve the matter.³⁹² The process contains an enforcement component, providing a remedy either in the form of compensation by the offending state member or the suspension of trade concessions made by the affected state if the Panel’s

385. *Id.*

386. *See, e.g.,* INTERNATIONAL CASEBOOK, *supra* note 378, at 467–68 (providing a brief introduction to the functions of the WTO framework).

387. Susan Tiefenbrun, *Free Trade and Protectionism: The Semiotics of Seattle*, 17 ARIZ. J. INT’L & COMP. LAW 257, 262 (2000).

388. *See* WTO, UNDERSTANDING THE WTO: PRINCIPLES OF THE TRADING SYSTEM, at http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Apr. 20, 2005) (explaining the basic principles of the WTO’s most favored nation principle).

389. *Id.*

390. *Id.*

391. Lawrence D. Roberts, *Beyond Notions of Diplomacy and Legalism: Building a Just Mechanism for WTO Dispute Resolution*, 40 AM. BUS. L.J. 511, 520 (2003).

392. *See, e.g.,* INTERNATIONAL CASEBOOK, *supra* note 378, at 591–96 (explaining the WTO Dispute Settlement Understanding).

recommendation is not implemented.³⁹³

This process was recently employed against the United States with regard to obligations under GATS. In 2003, Antigua and Barbuda requested dispute settlement through the WTO because “the supply of gambling and betting services from another WTO Member (such as Antigua and Barbuda) to the United States on a cross-border basis is considered unlawful under United States law.”³⁹⁴ The issue was especially important for this small Caribbean nation in light of estimates that it sustained losses of “some \$90 billion over the last three years as a result of the restrictions, reducing the number of Internet gambling enterprises from 119 to 30 in the same period and reducing employment in the sector from 5,000 to less than 1,000.”³⁹⁵ In the dispute,

Antigua and Barbuda argued that the U.S. schedule of market access commitments under chapter 10.D covering “other recreational services (except sporting)” as defined by the WTO’s Services Sectoral Classification List and the United Nations’ Provisional Central Product Classification (CPC) system, implied a full commitment on the cross-border supply of gambling and betting services.³⁹⁶

Arguing this point in his opening statement to the panel, Sir Ronald Michael Sanders emphasized that “what Antigua wants to compete in is the colossal United States domestic gambling market. And the only way we *can* compete is on a cross-border basis”³⁹⁷

The argument against the United States pointed to dozens of local, state, and federal laws as contrary to GATS obligations.³⁹⁸ In response, the United States countered by asserting that “cross-border betting and gambling services were not within the scope of its specific market access

393. See *id.* at 594–96 (discussing various enforcement options under the WTO Dispute Resolution Understanding).

394. United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/1, SL/110, *Request for Consultations by Antigua and Barbuda* (Mar. 27, 2003), 2003 WL 1697761.

395. Daniel Pruzin, *Antigua-Barbuda Wins WTO Interim Ruling Against U.S. Internet Gambling Restrictions*, 21 Int’l Trade Rep. (BNA) No. 13, at 514 (Mar. 25, 2004).

396. *Id.*

397. *Second Meeting of the World Trade Organisation (WTO) Panel in the Dispute: United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services WT/DS285*, para. 5 (Jan. 26, 2004) (Opening Statement by Sir Ronald Michael Sanders, Chief Foreign Affairs Representative of Antigua and Barbuda), available at http://www.antiguabarbuda.com/business_politics/pdf/openingstatementsecondpanlehearingwto260104.pdf.

398. Pruzin, *supra* note 395, at 514.

commitments under the GATS.”³⁹⁹ However, the panel finding ultimately rejected the U.S. position, finding the particular laws restricting gambling were inconsistent with GATS obligations and must be brought into international compliance.⁴⁰⁰

The panel’s decision is significant for illustrating the need to consider how domestic restrictions on service sector operations could impact GATS obligations. Many of the recently proposed offshore outsourcing laws, such as call center restrictions and disclosure guidelines aimed at hampering foreign operations, might touch on various GATS obligations. Similarly, “[a]s a matter of law, ‘Buy American’ (or ‘Buy Local’) laws are illegal under [GATS] when they relate to purchases by private buyers.”⁴⁰¹ Thus, policymakers should consider GATS as well as other international agreements before implementing restrictive measures.

In the WTO context, consideration of international agreements may become increasingly complex as binding commitments may involve new, separately negotiated agreements that impose heightened obligations on the United States. For instance, a fairly recent commitment is an agreement on duty-free electronic commerce obligating members “to refrain from imposing customs duties on electronically delivered products.”⁴⁰² Evidence suggests that this type of specific commitment is likely to become an increasingly common feature in future negotiations. For instance, in pointing out that the Doha negotiations were back on track, United States Trade Representative (USTR) Robert B. Zoellick stated that the U.S. has “agreed to intensify negotiations to open services markets” and is “launching negotiations on customs procedures that will cut red tape and reduce the cost of selling into some countries by as much as fifteen percent.”⁴⁰³

Labor issues associated with offshore outsourcing may be proper items to include in future WTO negotiations. Professor Robert W. Straiger, for example, sets forth

399. *Antigua Wins Case Against USA at WTO on Internet Gambling; USA to Appeal*, BBC MONITORING AMERICAS, Mar. 25, 2004, 2004 WL 63925418.

400. *Id.*

401. BIERCE & KENERSON, P.C., INTERNATIONAL OUTSOURCING: LEGALITY OF XENOPHOBIA IN OUTSOURCING, at http://www.outsourcing-law.com/articles/xenophobia_in_outsourcing.asp (last visited Apr. 20, 2005).

402. AADITYA MATTOO & SACHA WUNSCH, PREEMPTING PROTECTIONISM IN SERVICES: THE GATS AND OUTSOURCING 11 (Jan. 2004), at <http://www.iie.com/publications/papers/wunsch0204.pdf>.

403. Press Release, Office of the U.S. Trade Rep., Doha Talks Back on Track as WTO Agrees on Negotiating Framework (July 31, 2004), available at http://www.ustr.gov/Document_Library/Press_Releases/2004/July/Doha_Talks_Back_on_Track_as_WTO_Agrees_on_Negotiating_Framework.html.

two reasons why . . . problems associated with labor standards might sensibly be handled in the WTO: (a) they are market-access problems, which the WTO (and GATT before it) has had over 50 years of experience in handling; and (b) they are problems that are likely to be exacerbated by other WTO commitments (i.e., tariff bindings).⁴⁰⁴

If labor issues are omitted, the consequences may be significant. Accordingly, if WTO negotiations only focus on lowering tariffs, the free trade and efficiency rationales may be seriously undermined in the event that governments later attempt to change their labor standards for their own competitive benefit.⁴⁰⁵ Therefore, to avoid races-to-the-bottom with labor standards, U.S. negotiators should view labor matters as inexorably intertwined with trade issues.

Even if the WTO law is unsuccessful in generating new attention at the WTO for certain issues arising from offshore outsourcing, it might "allow[] WTO Members to address non-pecuniary externalities by invoking their domestic legislation to this effect."⁴⁰⁶ For instance, Article XX GATT, or Article XIV of GATS, offers exceptions for certain domestic trade practices that otherwise violate WTO commitments.⁴⁰⁷ One might argue that new U.S. legislation aimed at foreign services produced through unfair labor standards could be considered a matter of "public order" under Article XIV GATS and is, therefore, permissible.⁴⁰⁸ Another rationale, on the basis of Article XIV, may be that establishing strong labor protections is necessary to protect human health.⁴⁰⁹ Legislators would argue that such an approach is the least restrictive option to achieve the domestic goal.⁴¹⁰

A. *Regional, Bilateral and Multilateral Agreements*

In addition to participating in ongoing WTO trade negotiations, the U.S. government has actively pursued numerous bilateral, regional, and multilateral agreements with provisions related to services, labor, and free

404. Robert W. Staiger, *A Role for the WTO*, in INTERNATIONAL LABOR STANDARDS, *supra* note 281, at 273, 286.

405. *Id.*

406. See, e.g., Petros C. Mavroidis, *The Need to Micro-Manage Regulatory Diversity*, in INTERNATIONAL LABOR STANDARDS, *supra* note 281, at 314, 315.

407. See *id.* at 318 (discussing the standard a WTO member must meet in order to justify a measure that would otherwise violate WTO commitments).

408. *Id.*

409. GATS art. XIV.

410. See *id.* (providing an exception to Article XIV for measures "necessary to protect human . . . health"); Mavroidis, *supra* note 406, at 318 ("The term necessary . . . has been constantly interpreted as obliging WTO members to choose the (reasonably available) least restrictive option to reach their goals.").

trade. In 2004, the United States entered four free trade agreements (FTAs): the U.S.-Australia Free Trade Agreement, the U.S.-Bahrain Free Trade Agreement, U.S.-Morocco Free Trade Agreement, and the Central American Free Trade Agreement (CAFTA).⁴¹¹ These agreements may be useful for addressing issues connected with offshore outsourcing. For example, “[t]he prospect of a free trade agreement (FTA) with the United States helped to forge a domestic consensus for labor law reform in Morocco, spurring reform efforts that had been stymied for more than 20 years.”⁴¹² This new Moroccan law went into effect in June of 2004, raising the minimum employment age to combat child labor and guaranteeing rights of association and collective bargaining.⁴¹³

Similarly, every recent FTA has focused on regulatory transparency as a necessary reform for the foreign signatory’s legal system.⁴¹⁴ The U.S. International Trade Commission has noted that regulatory transparency is particularly important to cross-border trade in services and the establishment of a commercial presence in the service industries “because many services are heavily regulated owing to their influence on public health, consumer welfare, and safety.”⁴¹⁵ By promoting this policy in each agreement, the United States may be able to achieve far-reaching policy goals as more countries become interested in concluding agreements. With regard to CAFTA, for example, because many of the signatory countries “have not heretofore enjoyed open regulatory processes, the agreement promises to bring substantial benefits in increased foreign direct investment and to strengthen the rule of law.”⁴¹⁶

By continuing to pursue FTAs, the United States could employ a strategy of linking the prospect of enhanced trading relations with maintaining certain minimum standards in labor protection, data privacy,

411. See OFFICE OF THE U.S. TRADE REP., TRADE AGREEMENTS, at http://www.ustr.gov/Trade_Agreements/Section_Index.html (last visited Apr. 29, 2005) (listing recent bilateral agreements).

412. OFFICE OF THE U.S. TRADE REP., MOROCCO FTA LEADS TO PROGRESS ON LABOR REFORM (June 23, 2004), at http://www.ustr.gov/Document_Library/Fact_Sheets/2004/Morocco_FTA_Leads_to_Progress_on_Labor_Reform.html [hereinafter MOROCCO LABOR REFORM].

413. *Id.*

414. See generally OFFICE OF THE U.S. TRADE REP., BILATERAL TRADE AGREEMENTS, at http://www.ustr.gov/Trade_Agreements/Bilateral/Section_Index.html (last visited Apr. 29, 2005) (providing links to information on recent FTAs).

415. U.S. INT’L TRADE COMM’N, U.S.-CENTRAL AMERICA-DOMINICAN REPUBLIC FREE TRADE AGREEMENT: POTENTIAL ECONOMYWIDE AND SELECTED SECTORAL EFFECTS 56–57 (Aug. 2004), available at <http://www.usitc.gov/WAIS/pub3717.pdf>.

416. THE U.S.-CENTRAL AMERICA FREE TRADE AGREEMENT (CAFTA), REPORT OF THE INDUS. SECTOR ADVISORY COMM. ON SERVS. FOR TRADE POL’Y MATTERS (ISAC 13) 2 (Mar. 17, 2004), at http://ustr.gov/assets/Trade_Agreements/Bilateral/CAFTA-DR/CAFTA_Reports/asset_upload_file66_5959.pdf.

and service sector operations. To a large extent, by virtue of several executive agency review mechanisms, the United States already emphasizes these goals in the process of negotiation, drafting, and substantive review of legal provisions. Pursuant to section 2102(c) of the Trade Act of 2002,⁴¹⁷ the U.S. Department of Labor, assisted by other agencies, must prepare specific reports for each new FTA.⁴¹⁸ Three of these reports provide important data and recommendations in defined areas: “a United States Employment Impact Review, Labor Rights Report, and Laws Governing Exploitative Child Labor Report.”⁴¹⁹

Similarly, “the Trade Act of 2002 requires that advisory committees provide the President, the U.S. Trade Representative, and Congress with reports required under Section 135(e)(I) of the Trade Act of 1974 . . . not later than 30 days after the President notifies Congress of his intent to enter into an agreement.”⁴²⁰ With regard to the U.S.-Bahrain FTA, this involved “27 trade advisory committees, comprising more than 750 practitioners representing diverse interests and views.”⁴²¹ Because offshore outsourcing has not been a major issue in these assessments, reforms should focus on tailoring a portion of the review toward addressing issues stemming from offshore outsourcing. In turn, negotiators could follow advisory committee suggestions to urge signatory nations to improve legal protections for their own citizens and to avoid a race-to-the-bottom method for attracting business.

In light of the status of the Office of the USTR as an executive branch agency responsible for trade policy, new policies and negotiations conducted by the agency constitute federal objectives in international trade that preempt contrary state and local laws.⁴²² Accordingly, positions and ongoing negotiations of the Office of the USTR should be considered by state lawmakers to avoid having newly implemented laws challenged as

417. 19 U.S.C. § 3802(c) (2000).

418. BUREAU OF INT’L LABOR AFFAIRS, U.S. DEP’T. OF LABOR, LABOR-RELATED REPORTS FOR U.S. FREE TRADE AGREEMENTS, at <http://www.dol.gov/ilab/media/reports/usfta/main.htm> (last visited Apr. 29, 2005).

419. *Id.*

420. THE U.S.-BAHRAIN FREE TRADE AGREEMENT (FTA), REPORT OF THE ADVISORY COMM. FOR TRADE POL’Y AND NEGOTIATIONS (ACTPN) 1 (July 14, 2004), available at http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Bahrain_FTA/Reports/asset_upload_file713_5503.pdf.

421. OFFICE OF THE U.S. TRADE REP., ADVISORY GROUP REPORTS ON U.S.-BAHRAIN FTA, available at http://www.ustr.gov/Trade_Agreements/Bilateral/Bahrain_FTA/Reports/Section_Index.html (last visited Apr. 28, 2005).

422. See generally OFFICE OF THE U.S. TRADE REP., MISSION OF THE USTR, at http://www.ustr.gov/Who_We_Are/Mission_of_the_USTR.html (last visited Apr. 28, 2005) (describing the USTR as an executive branch agency “responsible for developing and coordinating U.S. international trade, commodity, and direct investment policy, and overseeing negotiations with other countries”).

being preempted by federal policy. This heightened concern is warranted in light of the U.S. Supreme Court's holding that "exercise of the federal executive authority means that state law must give way where . . . there is evidence of clear conflict between the policies adopted by the two."⁴²³

B. Global Treaty on Offshore Outsourcing

Because offshore outsourcing is an expanding business practice that involves developing and developed nations, trade and labor concerns, and the rights of individuals, one solution may be the development of an international treaty framework. Commenting on the purposes of international law, Professor Fernando R. Tesón argues that "[i]nternational law is concerned, at least in part, with incorporating those rules and principles that are deemed just on a global scale."⁴²⁴ This attribute of international law is reflected in the overall purposes and ongoing projects of international organizations. The Charter of the United Nations (U.N.), for example, indicates that the purposes of the U.N. include: (1) achieving "international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights" and (2) "[t]o be a centre for harmonizing the actions of nations in the attainment of these common ends."⁴²⁵ These general objectives have led to the formation of subsidiary bodies like the U.N. Commission on International Trade Law (UNCITRAL) and the International Labour Organization (ILO).⁴²⁶

Both UNCITRAL and the ILO encourage nations to participate in developing international treaties and conventions on important matters which require uniform standards and cooperation. Although each entity is involved in varied work, their relative successes in generating international collaboration are important factors to consider in determining whether offshore outsourcing is an appropriate subject for international treaties.

Perhaps the best-known example of UNCITRAL's work is the U.N. Convention on Contracts for the International Sale of Goods (CISG) which has been accepted by sixty-four Nation-States.⁴²⁷ The CISG "applies to

423. *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 421 (2003).

424. FERNANDO R. TESÓN, *A PHILOSOPHY OF INTERNATIONAL LAW* 15 (1998).

425. U.N. CHARTER art. 1, paras. 3 & 4.

426. See U.N. COMM'N ON INT'L TRADE LAW, UNCITRAL FREQUENTLY-ASKED QUESTIONS, at <http://www.uncitral.org/english/news/FAQ.htm> (discussing the formation and objectives of UNCITRAL) (last visited Apr. 28, 2005).

427. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 19 I.L.M. 671 (the English language text is reproduced in 52 Fed. Reg. 6264 (Mar. 2, 1987)); see also U.N. COMM'N ON INT'L TRADE LAW, STATUS OF CONVENTIONS AND MODEL LAWS, at <http://www.uncitral.org/english/status/status-e.htm> (last visited Apr. 28, 2005) (listing the signatories to the CISG).

contracts for the sale of goods between parties whose places of business are in different States [countries] and either both of those States are Contracting States or the rules of private international law lead to the law of a Contracting State.”⁴²⁸ The treaty has been widely noted for improving international trade by resolving some of the conflicts arising between national laws on sales and contracts.⁴²⁹ However, the process leading up to the final draft of the CISG demonstrates some problems with treaty-based solutions. It is important to note that “[p]reparation of a uniform law for the international sale of goods began in 1930.”⁴³⁰ The final version was implemented fifty years later, in 1980, after overcoming difficulties in structuring the agreement to accommodate different legal, social and economic systems.⁴³¹ This significant time lag is one disadvantage of using treaties. Another concern is that “even if it is possible to find agreement to a uniform set of laws, one still has to determine how to maintain this uniformity in the interpretation of the law.”⁴³² Accordingly, post-implementation issues stemming from conflicting interpretations by individual nations may be difficult to resolve without a superior authority vested with this responsibility.⁴³³

Like the UNCITRAL, a consideration of the ILO’s work in drafting over 180 conventions relating to labor standards and basic individual rights illustrates the dynamics of treaty-based solutions.⁴³⁴ From the body of ILO documents, eight ILO conventions on core labor standards are widely accepted as coming “close to an internationally agreed upon set of standards.”⁴³⁵ Along with the positive aspect of pervasive acceptance associated with the core ILO conventions, one must also consider the

428. Henry D. Gabriel, *A Primer on the United Nations Convention on the International Sale of Goods: From the Perspective of the Uniform Commercial Code*, 7 IND. INT’L & COMP. L. REV. 279, 279 (1997).

429. See, e.g., Philip Hackney, Comment, *Is the United Nations Convention on the International Sale of Goods Achieving Uniformity?*, 61 LA. L. REV. 473, 476 (2001) (“[The CISG] provides the international legal and business community with a good text and structure that they can debate on common ground and thereby arrive at a greater level of uniformity in international sales law.”).

430. Explanatory Note by the UNCITRAL Secretariat, United Nations Convention on Contracts for the International Sale of Goods, at para. 2, at <http://www.uncitral.org/english/texts/sales/CISG.htm> (last visited Apr. 28, 2005).

431. *Id.* at para. 3.

432. Hackney, *supra* note 429, at 475.

433. See, e.g., *id.* (noting that the convention does not have a “superior body to provide the ‘true’ interpretation of its rules”).

434. See, e.g., INT’L LABOUR ORG., ILOLEX DATABASE OF INTERNATIONAL LABOUR STANDARDS, at <http://www.ilo.org/ilolex/english/convdisp1.htm> (last visited Apr. 28, 2005) (listing conventions drafted by the ILO).

435. MATTHIAS BUSSE, DO LABOUR STANDARDS AFFECT COMPARATIVE ADVANTAGE? EVIDENCE FOR LABOUR-INTENSIVE GOODS 3 (Ctr. for Int’l Econ. Studs., Adelaide Univ., Discussion Paper No. 0142, 2001), at <http://www.adelaide.edu.au/cies/0142.pdf>.

negative aspect. For example, despite “widespread agreement on the principles of these conventions, only 63 countries have ratified all eight.”⁴³⁶ For example, the United States has ratified only two of these conventions.⁴³⁷ Thus, major issues for treaty-based solutions may extend beyond mere acceptability of the policies and issues involved. In the ILO context, reluctance to adopt some of the conventions may relate to the wording or incompatibility with domestic legal frameworks.⁴³⁸ Because offshore outsourcing also involves labor issues, similarly contentious issues relating to language and compatibility are possible.

Furthermore, ratification of ILO treaties does not necessarily equate to high labor standards. For example, some nations like Rwanda, which has ratified all eight conventions, do not have comparable labor standards to the United States.⁴³⁹ Thus, even if treaties were used to provide uniform standards for offshore outsourcing, nations that simply ratify a particular treaty would not ipso facto be solving the true problems attributed. One way this problem can be addressed is to include effective methods for monitoring and enforcement when pursuing a treaty-based solution.

Even with a dispute settlement system that bolsters enforcement, there is no assurance of truly enforceable international standards pursuant to treaties. Still, the aspects of dispute settlement are worth considering. Professors Crowley and Jackson of the University of Michigan point out that “[d]ispute settlement procedures assist in making rules effective, adding an essential measure of predictability and effectiveness to the operation of a rule-oriented system”⁴⁴⁰ However, they acknowledge a major difficulty in that any international dispute settlement decision “treads on the delicate and confusing issue of national ‘sovereignty.’”⁴⁴¹

Accordingly, if offshore outsourcing was the subject of a treaty and an accompanying dispute settlement process, a major issue would be how to structure dispute settlement to best account for national differences while upholding treaty standards. One method is to analyze successful structures for dispute resolution, such as the International Tribunal for the Law of the Sea or the WTO Dispute Settlement Understanding (DSU) process.⁴⁴²

436. *Id.*

437. *Id.*

438. *Id.*

439. *Id.* at 4.

440. Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 AM. J. INT’L L. 193, 193 (1996).

441. *Id.* at 194.

442. See, e.g., WTO, DISPUTE SETTLEMENT, at http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm. (describing the mechanics of the DSU); see also INT’L TRIBUNAL FOR THE LAW OF THE SEA, GENERAL INFORMATION—OVERVIEW INTRODUCTION, at http://www.itlos.org/general_information/overview/intro_en.shtml (providing a general overview of the dispute resolution process).

After studying the efficacy of these structures, a dispute resolution mechanism could be modeled similarly while, at the same time, tailoring the new system to the offshore outsourcing treaty.⁴⁴³ Another option is to create the treaty in a manner that relies on an existing dispute settlement process, such as the WTO's DSU or the Administrative Tribunal of the ILO. Pursuing this method may involve additional procedural calculations, internal modifications, and consideration of the international organization involved.

A potential problem in relying on existing organizational structures when developing an offshore outsourcing treaty is that the organization's scope and purpose may be too limited. For example, the WTO is devoted to the rules of trade between nations while the ILO focuses on internationally recognized human and labor rights. Although these purposes relate to offshore outsourcing, each is incomplete with respect to resolving important issues that would arise in such areas as labor, trade, immigration, human rights, and telecommunications.

V. CONCLUSION

Although political leaders, academics, and business executives sometimes disagree on the precise effects of offshore outsourcing, all agree that "outsourcing is a global economic reality."⁴⁴⁴ In fact, as communication infrastructures become more sophisticated and new technologies emerge, businesses may view offshore outsourcing as a competitive necessity. For instance, increased outsourcing of R&D, the "innovation itself," has led to predictions of a "rethinking of the structure of the modern corporation."⁴⁴⁵ However, gradual evolution of offshore outsourcing does not mean that legal and market forces should not adapt accordingly. In outlining several options, this Article has emphasized that no solution will be perfect or entirely comprehensive. Instead, the goal should be to address particular aspects of the offshore outsourcing transaction rather than allowing problems to simply go unanswered.

In discussing the U.S. domestic legal framework, this Article has noted that privacy and labor law are two areas that may be best suited for reform. However, because offshore outsourcing touches on immigration, tax, education, telecommunication, and export controls, reform efforts

443. See, e.g., Ernst-Ulrich Petersmann, *Constitutionalism and International Organizations*, 17 NW. J. INT'L L. & BUS. 398, 465-69 (1997) (discussing the WTO Dispute Settlement System as a model for other international dispute resolution systems).

444. *Outsourcing—Nothing New, Nothing to Fear*, RUSSIAN NEWS & INFO. AGENCY NOVOSTI, Nov. 2, 2004, available at http://en.rian.ru/rian/index.cfm?prd_id=126&msg_id=5040006.

445. Pete Engardio and Bruce Einhorn, *Outsourcing Innovation*, BUS. WK., Mar. 21, 2005, at 84.

should continue to explore all potential avenues for effectuating change. In addition, private legal arrangements and market-based solutions have been suggested as ways to encourage immediate and effective changes. Finally, international law solutions through free trade agreements, an offshore outsourcing treaty, and the WTO have been noted as potentially important considerations even when focusing primarily on changes to domestic law.

A. Potential Domestic Law Reforms

1. Federal Privacy Law

HIPAA is one example of a federal statute that imposes heightened privacy requirements. Beyond its direct application to offshore outsourcing, the impact of HIPAA demonstrates that competitive marketing may emerge in response to heightened regulatory standards. Accordingly, new offshore outsourcing privacy regulations might spur new businesses that market their compliance expertise as a competitive advantage. This same logic holds true when assessing the EU Data Privacy Directive. Although the Directive imposed heightened regulatory standards, arguably mandating compliance extraterritorially, other countries rose to the higher standard because of interest in taking advantage of the market opportunities available after compliance. Following this approach, the United States could enact strong domestic legislation based on privacy to use as a mechanism for regulating offshore outsourcing standards. In addition to improving conditions at home, the heightened standards might induce international improvements due to the desire of foreign businesses to remain competitive in the U.S. market. This cause and effect relationship has been shown with regard to the Sarbanes-Oxley Act.⁴⁴⁶

On the state and local level, privacy law reform can also have a significant role in addressing offshore outsourcing. The use of uniform laws, for instance, is one option to strengthen data protection. Another method is the use of common law principles in tort and contract to bring actions against individual companies engaged in offshore outsourcing. The grounds for this type of legal action would likely be breach of fiduciary duty, breach of implied contract, or publication of private facts. Although common law actions only remedy individual cases, history shows that these actions may be a significant force for promoting new law and changes in corporate practice.

446. See Myers, *supra* note 245, at 30–33.

2. Labor Law

Under existing U.S. labor law, it may be possible for workers who are displaced by certain offshore outsourcing schemes to file actions alleging discrimination on the basis of national origin under Title VII. This type of claim, however, has not yet been attempted, and courts have not evinced a willingness to view offshore outsourcing as a form of national origin discrimination. Yet another approach is pursuing modification to various provisions of labor law.

Potential topics for labor law reform could include reduced obstacles to union organizing, compensation for displaced U.S. workers, and sanctions targeted at companies that violate internationally recognized labor rights. Although there are several ways in which these goals could be accomplished, three proven methods are: (1) modifying statutory definitions to include a category for offshore workers when they are performing service sector tasks, (2) creating a special committee for recommending minimum labor standards that could be applied to a defined class of offshore workers, and (3) drafting an entirely new section in Title 29 to cover offshore outsourcing as a distinct form of employment arrangement. Comparisons to current law show that each is a viable option. The context and history of the Migrant and Seasonal Agricultural Worker Protection Act illustrates that a balanced approach can be employed to drafting a new section in Title 29 for addressing special situations. Similarly, the special committee structure and other unique aspects of labor law provisions directed to American Samoa show that the law may be tailored to balance the interests of a specially defined class of workers with business interests in competition. Although U.S. labor law does not currently address numerous labor issues involved with offshore outsourcing, this article suggests laws could be modified to target certain labor matters without violating obligations under the WTO Agreements. The rationale is that unfair labor standards could be considered as a matter of public order or necessary to protect human health under GATS Article XIV and, therefore, permissible.⁴⁴⁷

B. Market-based Solutions and Private Legal Agreements

Internal market-based forms of regulation and private legal agreements have long served as necessary adjuncts to traditional statutory law by creating incentives for compliance or requiring certain professional

447. See, e.g., Mavroidis, *supra* note 406, at 315 (asserting that the WTO law definitely allows WTO Members to address certain "pecuniary externalities" by invoking their own domestic legislation); GATS art. XIV (discussing the idea that establishing strong labor protections is necessary to protect human health).

uniformity as prerequisite for holding oneself out as a member of a group. The use of ethical codes, monitoring agencies, certification systems, and legal agreements are all methods developed in the private sector that may be helpful in regulating offshore outsourcing. For example, an outsourcing code of ethics and a recognized seal or imprimatur indicating maintenance of high standards are potential techniques.

Another method, in the labor law context, is the use of model agreements or standard contracts drafted by unions or professional associations to secure certain minimum protections and employment conditions. These types of standard contracts have proven to be successful in other relationships with diverse parties. The best example is the wide use of standardized construction contracts drafted by the AIA.⁴⁴⁸ Similarly, a fair, well-drafted labor contract resolving offshore outsourcing issues could be marketed for its quality in attracting new talent, efficiency in solving disputes, and effectiveness in striking an appropriate balance between corporate flexibility and employee interests.

Despite large membership declines in recent years,⁴⁴⁹ labor unions are a potential tool for shaping new protections for domestic employees as well as new business standards for offshore outsourcing. Two innovative solutions for labor unions are the use of global framework agreements (GFAs) and encouraging a new corporate methodology based on the legal and social concepts of Japanese employment models. GFAs are agreements negotiated between unions and corporations that subsequently become adopted as policy of the particular company. Most GFAs include the ILO's Core Labour Standards as well as provisions addressing wages and working conditions. These agreements are valuable for setting basic labor standards applicable to all facilities worldwide while promoting fair and open trade.

Although it is unlikely U.S. lawmakers or individual corporations would consider the Japanese employment model outright, underlying principles in the Japanese system may shed light on how to balance business success with labor protection. In this regard, the Japanese employment approach is important for highlighting two broad principles: (1) workers deserve higher status than that of mere expendable commodities that may be reduced in response to corporate cost-saving needs, and (2) internal mitigation efforts should be the first resort in times of economic difficulty. These principles do not require lifetime employment guarantees or a drastic shift in labor law. Instead, unions could cite Japanese practices as demonstrating that employment reductions can be minimized while still achieving success economically. Proposals

448. AIA CONTRACTS, *supra* note 341.

449. See, e.g., Kristin Harty, *Union Member Numbers Down*, CHRON.-TRIB. (Marion, IN), Mar. 11, 2003, at 1A (discussing declines in union membership).

could include asking U.S. corporations to simply try to minimize the human costs by mitigating and cost-cutting in other areas first.

The reason that U.S. firms would enter into these agreements and corporate policy changes is that an employees-go-last philosophy could enhance corporate competitiveness. For instance, evidence from the Japanese methods of allocating surplus workers suggests that by deploying workers in areas that enhance internal quality, such as development and market expansion, the corporation receives a net benefit.

C. International Law

Because offshore outsourcing involves trans-border issues, consideration of international law is essential even when pursuing reform at the domestic level. As a member of the WTO, the United States has a responsibility to adhere to basic MFN and national treatment principles as well as other binding commitments negotiated in the WTO context. Accordingly, it is important for all levels of government to consider the U.S. commitments to the WTO and other international treaties. Based on successful agreements in the WTO context for subjects like electronic commerce, it may be possible for the United States and other nations to negotiate an agreement for offshore outsourcing and labor regulations. However, even with the potential impact of new WTO, UN, and ILO policies on offshore outsourcing, it should be noted that each organization may face difficulty in compelling absolute adherence to a particular standard. Still, past work through these entities has yielded a level of international cooperation and recognition of certain international norms that have improved labor and trade matters.

The current framework of international organizations and legal agreements provides a means for pursuing reform on a global or regional scale. For instance, in the negotiation of FTAs, the United States could employ a strategy of linking enhanced trading relations with the maintenance of certain minimum standards in labor protection, data privacy, and service sector operations. Once in place, a country that has agreed to an FTA would be obliged to honor its commitments by reforming and improving upon its own domestic laws. In Morocco, for example, the prospect of achieving an FTA agreement with the United States induced Moroccan legislators to enact significant new labor laws.⁴⁵⁰

This same approach of inducing high international standards through trade policy negotiations could also apply to new agreements and proposals under the WTO framework. However, if the international negotiations fail to yield results, the United States could implement certain legislation with

450. MOROCCO LABOR REFORM, *supra* note 412.

extraterritorial effects without offending WTO commitments if the legislation fits within an authorized exception listed in WTO agreements.⁴⁵¹ In addition to these options, a long-term solution may be creating a global offshore outsourcing treaty. However, as previously discussed, this option is very difficult, time consuming, and imperfect in reaching a complete solution to all issues.

451. See GATS art. XIV (providing for general exceptions to the provisions of GATS).